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OF THE

LAWS OF ENGLAND

VOLUME VIII

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ENCYCLOPÆDIA

OF THE

LAWS OF ENGLAND

BEING A

NEW ABRIDGMENT

BY THE

MOST EMINENT LEGAL AUTHORITIES

GOVERNMENT OF BENGAL
4. MAY. 01
LEGISLATIVE DEPARTMENT

UNDER THE GENERAL EDITORSHIP OF

A. WOOD RENTON, M.A., LL.B.

OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME VIII

LODGER TO *MORTGAGE*

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OF

THE LAWS OF ENGLAND

Lodger.—The term *lodger* has no precise legal significance, and its construction and application have frequently given rise to considerable difficulty. It is defined in Wharton (*Law Dict.*, *s.v.*) to mean "a tenant with the right of exclusive possession of part of a house, the landlord, by himself or an agent, retaining general dominion over the house itself." This definition, however, as will be presently shown, can only be accepted as correct subject to a good deal of reservation. There seem to be four principal uses of the term. Firstly, it is often used loosely of a person who enters into a contract for food and lodging with the keeper of a boarding-house, without stipulating for the exclusive occupation of a particular room or rooms, though a separate apartment for sleeping may in fact be given to him. Secondly,—and this is by far the commonest use of the word,—it is employed to designate a person who takes part of, or rooms in, a house, the landlord or his agent residing also on the premises, and supplying him with what is usually called "attendance." Thirdly, the term is sometimes applied to a person who takes a part of a house, whether furnished or unfurnished, but brings in his own servants, or finds his own attendance, though the landlord reside also in the house. Lastly, the word is occasionally applied to a person who resides in a house which (like so-called "model dwellings" for the working classes) is divided off into separate tenements, approached by a common staircase, a servant or porter, appointed and paid by the landlord to perform specified services for the inmates, residing in some cases upon the premises.

In the first case it is clear that the occupier, if disturbed in his enjoyment, cannot maintain any action of trespass, but can only sue for breach of the agreement, which (it may be added) is not in any way one relating to an interest in land within the Statute of Frauds (*Wright* v. *Stavert*, 1860, 2 El. & El. 721); he has no legal occupation; he is of course not rateable; in short, he is not a tenant at all, but a mere boarder or inmate of a lodging-house.

In the second case it seems also clear that there is no real tenancy. "A lodger in a house," says Lord Blackburn (*Allan* v. *Overseers of Liverpool*, 1874, L.R. 9 Q. B. 180, at pp. 191, 192), "although he has the exclusive use of rooms in the house in the sense that nobody else is to be there, and though his goods are stowed there, yet is not in exclusive occupation . . . *because the landlord is there for the purpose of being able, as landlords*

commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession." If, then, the contract, as in these cases it is, is one by which one party, retaining the legal possession of the rooms, and keeping or sending his servants there, binds himself to supply the other with the ordinary requisites of fire, gas, and attendance, it is not a contract of tenancy, because, though the exclusive enjoyment is given, the exclusive possession is not parted with (*Smith* v. *St. Michael's, Cambridge*, 1860, 3 El. & El. 383). It is not a demise at all, because he has not parted with "all his interest" in the subject-matter (per Field, J., *Smith* v. *Lambeth Assessment Committee*, 1882, 9 Q. B. D. 585; affd. 10 Q. B. D. 327). It follows from this that, in the case of the class of lodgings now spoken of, there can be no right of distress for rent. This result may perhaps appear somewhat surprising, and is certainly opposed to what is stated to be the law in many text-books. The authority usually cited in support of the proposition that lodgers may be distrained upon for rent, is the decision in *Newman* v. *Anderton*, 1806, 2 N. R. 224. In that case, however, the letting was of a bedroom and shop with furniture; it nowhere appears from the report that attendance was furnished by the landlord; and the only point argued was the question whether, seeing that the amount of rent due was probably attributable in greater proportion to the use of the furniture than to the use of the realty, and that rent for which a distress may be levied must issue out of land, it could in this case be distrained for. It is therefore thought that *Newman* v. *Anderton* is really no authority against the proposition here submitted. If the above reasoning be correct, the holding of lodgers of the class now referred to is not by lease, but by licence,—to have the "easement and use" of the premises (see per Blackburn, J., *London and North-Western Rwy. Co.* v. *Buckmaster*, 1874, L. R. 10 Q. B. 70, at p. 76; affd. Ex. Ch. *id.* 444),—and that if such licence be improperly revoked or its conditions be departed from, an action *upon the contract* (see *Kerrison* v. *Smith*, [1897] 2 Q. B. 445) —and no other—will lie.

Although no case is known in which the above question has arisen directly for decision, the position of lodgers has frequently been the subject of judicial comment in rating cases. And inasmuch as where an exclusive occupation is conferred by a letting the grantee becomes rateable, whilst where merely a right to an exclusive enjoyment passes he takes no interest which renders him liable to be rated (*Smith* v. *Lambeth Assessment Committee*, 1882, 10 Q. B. D. 327, per Baggallay, L.J.), the question whether, in the case of an occupier of lodgings or apartments, there is a tenancy, and the consequent right of distress or not, corresponds, as will be seen, very closely with the question whether he can be made rateable. A lodger has exclusive *enjoyment* of the apartment let to him; but if the landlord retains the control and dominion of the whole structure, the tenant has not that exclusive occupation which is required to make him rateable (per Field, J., *s.c.*, 9 Q. B. D. 585). Similarly, it has been said that where a person has a mere right to use land in the nature of an easement, which does not amount to occupation, and the occupation remains in somebody else, as in the case of a lodger, where the occupation remains in the lodging-house keeper, then such person is not liable to be rated (*Cory* v. *Bristow*, 1875, 1 C. P. D. 54, per James, L.J.; affd., 1877, 2 App. Cas. 262). This, as previously explained, is for the reason that though a

lodger may have the exclusive *use* of the chambers he occupies, there is a concurrent right, reserved by the person who lets the lodgings, of using the house for whatever purposes he may think fit for managing the establishment (*s.c.*, per Lord Hatherley, 2 App. Cas. at p. 276; *Watkins* v. *Overseers of Milton-next-Gravesend*, 1868, L. R. 3 Q. B. 350, per Blackburn, J.). The same thing is sometimes expressed by saying that a lodger is not rateable whilst the landlord is, because the occupation of the former is subordinate whilst that of the latter is paramount (per Lord Herschell, L.C., *Holywell Union* v. *Halkyn Drainage Co.*, [1895] App. Cas. 117), the occupation of the former being subject at all times to the control and regulation of the latter (*s.c.*, per Lord Davey, at p. 134). And inasmuch as it is now clear law that the occupation of a lodger does not render him rateable (*Rochdale Canal Co.* v. *Brewster*, [1894] 2 Q. B. 852, per Lindley, L.J.), it is submitted that this can only be because, where the word is used in the particular sense now spoken of, no exclusive occupation and no tenancy can be said to exist. "By the agreement between the owner of the house and the lodger," says Lord Blackburn, "the servants of the owner clean the rooms, light the fires, etc.; the servants have constantly to go into the rooms to perform these duties; and the occupation of the rooms is by the person who thus employs servants to look after them" (*Roads* v. *Overseers of Trumpington*, 1870, L. R. 6 Q. B. 56). On the whole, then, it is submitted, both on principle and as the result of the authorities, in the case of all lodgers whose landlords reside on the premises, and furnish service or attendance in their apartments, that there is no exclusive occupation, no rateability, no tenancy, and no right of distress.

In the third case, where the taking is simply of rooms, furnished or unfurnished, in a house in which the owner continues to reside, the question whether there is a tenancy or not depends on different considerations. *Primâ facie* his occupation, as against his landlord, is exclusive; he can maintain, if disturbed in his user or enjoyment, an action against him, not merely of breach of contract, but of trespass (*Lane* v. *Dixon*, 1847, 3 C. B. 776); and consequently the relation between the parties is really that of landlord and tenant. This presumption, however, may be displaced by showing that, in the language of Field, J. (*Smith* v. *Lambeth Assessment Committee*, *supra*), the circumstances, taken together, point to the "control and dominion of the whole structure" having been in reality retained by the landlord. The ordinary criterion—and according to Cockburn, C.J. (*R.* v. *St. George's Union*, 1871, L. R. 7 Q. B. 90), "the only one"—in such cases is to be found in the control of the outer door; the test, according to him, being whether the landlord has shown, by his retaining the "control" of the outer door, that he has the control of the whole of the premises, so that, although he may be liable to an action upon the breach of his contract to allow the tenant to occupy a portion of the premises so let to him, yet the tenant could not maintain trespass against the landlord, because the landlord has retained in himself the dominion and control over the whole of the house (*ibid.* at p. 97). By the word "control" it seems clear that Cockburn, C.J., means a control which is exclusive; for he goes on to say that the reason why the possession of the street door may be taken as a criterion is that it is only by the landlord opening and shutting the street door, or allowing it to be opened and shut, for the ingress and egress of the tenant, that the latter can have the enjoyment of the premises. And he further states that he would have considered the parties before him to be really in the position of lodgers, if it could have been shown that the landlords had retained the *exclusive* control of the outer door, so that the

tenants could only come in and go out with their assent and permission. Consequently, the first point to consider, in regard to the class of lodgers now spoken of, is the outer door. If the exclusive control of the outer door is in the landlord, there is no exclusive occupation and no tenancy. But on the true view of the relation of landlord and lodger, it would seem that though "the possession of the outer door is of the highest importance" (*s.c.*, per Blackburn, J.), it is not the sole test, and that even in the ordinary case where the lodger has his own key, it may be—from the construction of the terms of letting, or (where there is no instrument in writing) from evidence showing an intention on the part of the landlord to retain the whole occupation in his own hands—that the same inference should be drawn (*ibid.*). "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying a part of the house occupies it as a lodger only, *and not as a tenant*, the question depending upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole" (*Toms* v. *Luckett*, 1847, 5 C. B. 23, per Maule, J., cited and adopted by Brett, L.J., *Morton* v. *Palmer*, 1881, 51 L. J. Q. B. 7; cp. *Bradley* v. *Baylis*, 1881, 8 Q. B. D. 195).

In the fourth case, as in the first, the application of the term "lodger" can hardly be justified, except in a loose and colloquial sense. It is, however, to be noticed that the provisions of an Act of Parliament—the Representation of the People Act, 1867 (30 & 31 Vict. c. 102)—directing the assessment to the poor-rate of the owner of every dwelling-house "wholly let out in apartments *or lodgings*" (s. 7)—have been held to apply to occupiers of this class (*Stamper* v. *Overseers of Sunderland*, 1868, L. R. 3 C. P. 488), and that it has been laid down that everybody occupying a part of a house, who was not a householder within the meaning of the Act, would be a "lodger" (per Brett, L.J., *Bradley* v. *Baylis*, *supra*, at p. 237). It seems clear that where the landlord lets out the whole of a house into separate apartments, and lets out each floor separately so as to demise the passages, reserving simply to each inmate of the upper floors the right of ingress and egress over the lower passages, but parts entirely with the whole legal ownership for the term demised, and retains no control over the house, the inmates are not lodgers but occupying tenants, and are capable of being rated as such (per Jessel, M. R., *Bradley* v. *Baylis*, *supra*, at pp. 219, 220). And the fact that the landlord may keep an agent or servant on the premises to render certain services to the tenants will not make any difference, in the absence of evidence showing an exclusive control of the outer door, or establishing in some other way that the presence of the servant is for the purpose of securing to the landlord the entire control over the whole of the premises (*R.* v. *St. George's Union*, *supra*). It is involved in what has just been stated that, in cases of this class, there is a real tenancy, a right of distress, and immediate liability to the burden of rates.

The question just discussed, as to whether, and under what circumstances, a lodger can be distrained upon applies, it need hardly be said, only to rent payable from him to his immediate landlord under the contract existing between them; and it has of course nothing to do with the question as to the liability he incurs, in common with any other person who may happen to have goods on the premises of which his lodgings form

part, to have those goods seized as a distress for the rent of those premises themselves. This liability to which lodgers were exposed having been thought to be a great hardship, the Legislature intervened in the year 1871 with a statute for their relief. This statute (34 & 35 Vict. c. 79), which is known as the Lodgers Goods Protection Act, and which it is thought best, from its importance and the frequency of its application, to set out in its material parts textually, is in the following terms:—

1. If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, settting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory knowing the same, or either of them, to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.

2. If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods, or otherwise, as to him or them may seem just; and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

3. Any payment made by any lodger pursuant to the first section of this Act shall be deemed a valid payment on account of any rent due from him to his immediate landlord.

The first observation which it is natural to offer upon the construction of this statute is that it nowhere defines, as perhaps it might be expected that it would define, the status of the person for whose relief and protection it was passed. The question as to who is and who is not a "lodger" within its terms has accordingly formed the subject of contention before the Courts on several occasions; and escape has been sought from the difficulties which have thus arisen, by laying down that the question is really one of fact (*Ness* v. *Stephenson*, 1882, 9 Q. B. D. 245). This, however, does not mean that, if the matter comes before a jury, the question whether the occupier is a lodger or not is to be left *simpliciter* to them, for this would be substantially leaving to them the question of the construction of the statute; but it is for the Court to direct the jury, according to the view of the facts which may be taken by them, whether the case is within the statute or not (*Morton* v. *Palmer*, 1881, 51 L. J. Q. B. 7, per Brett, L.J.). That the word is to be regarded as used in a popular sense (*Heawood* v. *Bone*, *infra*, per Stephen, J.), and that it involves the two ideas of living in another man's house, and living *with* him (see per Cotton, L.J., *Bradley* v. *Baylis*, 1882, 8 Q. B. D. 195), seems clear. It has been said that the question must be determined in accordance with the common understand-

ing of persons conversant with the business of letting and taking houses and apartments (per Brett, L.J., *Morton* v. *Palmer*, *supra*); and one thing at all events seems to be established beyond doubt, that a person does not "live" with another, within the rule, if he merely occupy a room or rooms in his house during the day, and sleep elsewhere (*Heawood* v. *Bone*, 1884, 13 Q. B. D. 179). On the other hand, it is not essential that the person with whom the lodger lives should himself sleep on the premises, or that any servant, acting on his behalf in the care of the premises, should do so (*Morton* v. *Palmer*, *supra*).

Of the four classes of occupiers who have been spoken of in the earlier portion of this article, it would appear to follow, from what has been said, that the two first would be within the Act, but probably not the fourth; whilst the third in some, though not in all, cases would also be "lodgers" within its scope. For though, as has been said, the possession by the occupier of separate and uncontrolled power of ingress to, and egress from, the premises is an important consideration in deciding whether there is exclusive occupation, and consequently a real tenancy, it has been held that such possession is not inconsistent with the retention of that general control by the landlord which is the principal ingredient in the relation of landlord and lodger for the purposes of the statute (*Ness* v. *Stephenson*, *supra*). Even where the real relation between the parties is that of lessee and under-lessee, as in the case where the greater portion of a house forms the subject of letting, exclusive occupation being at the same time conveyed, the relation of landlord and lodger for the purposes of the Act is not necessarily excluded (*Phillips* v. *Henson*, 1877, 3 C. P. D. 26).

Although it is notorious that the object of the Act was to prevent the hardship already alluded to from being inflicted on tenants of small means who live in lodgings,—to prevent poor persons, as it has been said, from having their homes broken up by distresses for rent by the superior landlord (per Stephen, J., *Heawood* v. *Bone*, *supra*),—there seems nothing in its language to confine its application to persons of that class. Cases have arisen, for instance, where a person living with a family in a country house, and keeping hunters in the stables attached to it, has claimed the benefit of protection; nor does there seem anything in the Act to exclude of necessity such a case from its operation. The statute, it will be noticed, speaks of "furniture, goods, or chattels." It seems rather odd that the ordinary collocation of those words in deeds and Acts of Parliament ("goods, chattels, or furniture") should have been departed from, as if the intention here were to confine the general words, "goods and chattels," according to a well-recognised rule, to goods in the nature of furniture; so that horses, for example, would not be included in the category. But it is thought that the language used is too definite to admit of that construction. It is further to be observed that the statute says nothing about the place, or the portion of the demised premises, to which the protection it confers applies; so that if the stables in the case just put formed part of the demise, there would seem to be no reason why the immunity from distress should not extend to them, whether the "lodger" has acquired by his agreement an interest in them or not.

The statute, as has been seen, requires that the lodger should make a declaration in writing. No particular time is fixed by the Act for making it, and it therefore may apparently be made within a reasonable time, or perhaps so long as the goods remain unsold. Where a landlord, by selling the goods before the expiration of the five clear days allowed for replevy by 2 Will. & Mary, sess. 1, c. 5, s. 2, deprived the lodger of the benefit of that

statute, it was held that a declaration under the Lodgers Goods Protection Act, made after the expiration of the five days, and after the sale, was sufficient to enable the lodger to maintain an action of illegal distress (*Sharp* v. *Fowle*, 1884, 12 Q. B. D. 385). The statute further provides that to the declaration "shall be annexed a correct inventory"; but whether this means that there must be two separate documents, or whether a declaration merely referring to the goods, *e.g.* "all the goods seized by you" in a particular place, would, if it left no doubt as to what goods were claimed, be sufficient, as in effect amounting to an inventory, does not appear to have been decided. It has, however, been pointed out on more than one occasion (*Morton* v. *Palmer*, 51 L. J. Q. B. 7, per Brett and Cotton, L.JJ.; *Thwaites* v. *Wilding*, 1883, 12 Q. B. D. 4, per Brett, M. R., and Bowen, L.J.), that as the landlord has a *primâ facie* right at common law to distrain all goods he finds on the demised premises, the lodger, if he wishes to defeat that right, so far as his goods are concerned, by the help of the statute, must take all necessary steps to comply rigidly with its requirements. As the statute, for example, only contemplates the service of the declaration where the superior landlord "shall levy, or authorise to be levied," a distress, the lodger cannot serve it, to protect his goods effectually, before the distress has been either actually levied, or at least threatened or authorised (*Thwaites* v. *Wilding*, *supra*). Consequently, where a distress on a lodger's goods was met by a properly-served declaration, and a second distress was put in, which was lawful (contrary to the usual rule as to second distresses) by reason of the failure of the lodger's immediate landlord to carry out an arrangement for payment of the rent which he had entered into at the time of the first, it was held that the lodger's goods were not protected where he had neglected to make a fresh declaration and inventory under the Act (*id.*). And it is further pointed out by Bowen, L.J., that the statute is not for the benefit of the lodger alone, that the superior landlord is to enjoy a correlative benefit (for he is to receive, in part discharge of his claim, payment of any rent which may be due from the lodger to his immediate landlord), and that it was intended by the Act that the existing rights of the parties should be ascertained at the moment when the distress is levied (*s.c.*). The occupier, as it has been held, must make out that he is a lodger *at the time of the seizure of the goods* (*Morton* v. *Palmer*, *supra*). There is, however, nothing in the Act which points to the conclusion that the declaration must contain in express terms a statement that the person who makes it is a lodger (*Ex parte Harris*, 1885, 16 Q. B. D. 130). And although the declaration is to set forth "whether any and what rent is due, and for what period" from the lodger to his immediate landlord, this only means that it is to state what rent is due, *if any is due*, and that if none is due in fact, nothing need be said on the subject in the declaration (*s.c.*). This decision shows a decided tendency to allow the lodger to escape from the necessity of "complying rigidly" with the terms of the statute.

Lastly, the Act specially directs (s. 3) that where a lodger is called upon to make any payment to the superior landlord under its provisions (*supra*), such payment shall operate as a valid payment *pro tanto* of rent due from him to his own landlord. This is only in affirmance of the general principle that when a tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorised by the landlord so to apply his rent due or accruing due; and this is held to

amount to payment of the rent itself, or part of it (*Graham* v. *Allsopp*, 1848 3 Ex. Rep. 186).

In regard to matters other than those already touched upon, the legal position of a lodger is the same as that of a tenant of apartments (see APARTMENTS). The presumption of law, for instance, as to the implication of a warranty on the part of the landlord of the fitness of furnished premises for occupation applies, as it has been expressly held, in the case of lodgings (*Sarson* v. *Roberts*, [1895] 2 Q. B. 395). But it stands on no higher footing; and the limitation of the rule to the condition of furnished houses or apartments *at the commencement of the tenancy* applies in the case of lodgings also (*s.c.*).

It has been held at *nisi prius* that letting lodgings is not a breach of a covenant in a lease not to underlet or otherwise part with the premises or the term or interest granted, or any part thereof, without the licence of the lessor (*Doe d. Pitt* v. *Laming*, 1814, 4 Camp. 73; 15 R. R. 728); Lord Ellenborough being of opinion that a covenant of this kind could only extend to such underletting as a licence might be expected to be applied for, and that nobody ever heard of a licence from a landlord to take in a lodger. The report of the case (4 Camp. at p. 78) says expressly that the lodger had the "exclusive possession" conveyed to him; but in a subsequent case, Parke, B., who seems to have disapproved of the grounds of the decision, points out that the premises in question consisted of a coffee-house, and that possibly there was no distinct agreement with the lodger for the occupation of a particular room (*Greenslade* v. *Tapscott*, 1834, 1 C. M. & R. 55). From what has already been said on this subject (*supra*), it would seem probable that, in the case where no exclusive possession is conveyed, the taking in of a lodger would not be held to amount to a breach of the covenant in question. Whether taking in lodgers—on a scale not amounting to the actual carrying on of a lodging-house—would be a breach of a covenant not to carry on any trade or business on the premises does not appear to have been decided, but it is thought that it would, if done as a matter of habitual practice (see *Rolls* v. *Miller*, 1884, 27 Ch. D. 71).

It has been held that, although in the execution of mesne process it is unlawful to break open an outer door (*Semayne's* case, 1604, 1 Sm. *L. C.* 99, 10th ed.), yet the door of a lodger's apartment may be broken, so long as peaceable entry by the outer door has been gained to the house in the first instance (*Lee* v. *Gansel*, 1774, Cowp. 1).

As to larceny by lodgers of chattels or fixtures let with the lodgings, see Larceny Act (24 & 25 Vict. c. 96), s. 74; and as to power of magistrates to order compensation to be paid by lodgers within the Metropolitan Police District for wilful or malicious injury to the premises or furniture, see 2 & 3 Vict. c. 71, s. 38.

As to the electoral rights of lodgers generally, see FRANCHISE, ELECTORAL.

Lodging House.—Besides the statutory provision as to COMMON LODGING HOUSES, *ante*, vol. iii. p. 142, the following provisions are also in force:—

In London.—Every sanitary authority is bound to make, subject to the approval of the Local Government Board, and enforce such by-laws as are necessary—

(i.) To fix the number of persons who may occupy a house or part of a house let in lodgings or occupied by members of more than one family, and for the separation of the sexes in such houses, etc.

(ii.) For the registration and inspection of such houses.

(iii.) For ensuring proper drainage and cleanliness and ventilation, and cleansing and lime-washing at stated times.

(iv.) For precautions in case of infectious disease (1891, c. 76, ss. 94, 114).

Penalties may be imposed for breach of the by-laws.

Where anyone has been ill of an infectious disease, any person who lets lodgings in the house without certified disinfection, or makes false statements on letting lodgings in such a place, is liable to penalties. This applies to inns and hotels (1891, c. 76, ss. 63, 64).

If the authority fail to make or enforce the by-laws, the County Council and Local Government Board can intervene.

Elsewhere in England.—Similar provisions are in force in the rest of England under secs. 90, 128, 129 of the Public Health Act, 1875, and sec. 90 of the Housing of the Working Classes Act, 1885. They are optional as to the making of by-laws (see Lumley, *Public Health*, 5th ed., 106–484).

Model by-laws for London and elsewhere have been prepared by the Local Government Board.

General.—Overcrowding lodging houses is dealt with as a nuisance under the Public Health Acts, 1875 (c. 55, s. 91) and 1891 (c. 76, s. 7).

Under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 214), lodging houses for seamen in seaport towns may be subjected to by-laws as to sanitary and others matters made by the local authority, and approved by the Board of Trade. The authority in London is the County Council; elsewhere the sanitary authority. Provision may be made by Order in Council prohibiting the keeping of such houses except by licensed persons.

Under Part 3 of the Housing of the Working Classes Act, 1890, power is given to public authorities to provide healthy lodging houses for the working classes. The authority is in London the County Council except in the city, and elsewhere the Urban District Council (53 & 54 Vict. c. 70, s. 53, Sched. I), or the Rural District Council if it has urban powers.

The liabilities of lodging-house keepers who harbour thieves or prostitutes are dealt with under HARBOURING *Felons*, vol. vi. p. 152; and PROSTITUTE.

Lodgings.—See APARTMENTS; FLAT; LODGER; LODGING HOUSE.

Log-book.—In every ship it is part of the duty of the master to his owners to keep a log-book of the events happening in and to his ship, and in steamships the engineer also keeps a log of the movements of the engines; but besides the ordinary ship's log, the Merchant Shipping Act, 1894, imposes on the master of every British ship (except traders between Scotch ports) the duty to keep an "official log." Such an official log must be in a form approved by the Board of Trade. The entries in it must be made as soon as possible after the events to which they relate, and dated both with the date of the occurrence and the date of the entry, and if they happen before the arrival of the ship at her final port of discharge, not later than twenty-four hours after that time; and they must be signed by the master and mate, or some other of the crew. If they relate to illness, injury, or death, they must also be signed by the doctor on board, if any; if they relate to wages due to, or the sale of effects of, a seaman or apprentice who dies, by the mate and one of the crew as well as the master; and if they relate to

wages due to a seaman entering the Royal Navy, by such seaman or the officer authorised to receive him into that service. Every entry so made is admissible in evidence (s. 239 (6)). The following matters must be entered by the master in the official log (besides those enumerated under CREW, vol. iv. p. 32):—(1) Any offences, such as desertion, absence without leave, and against discipline which it is intended to punish by fine (s. 228); (2) marriages taking place on board, with the parties' ages and names (s. 240); (3) the wages due to any seaman who enters the Royal Navy during the voyage, and any fine deducted therefrom (ss. 235 and 240); (4) the wages due to any seaman or apprentice who dies during the voyage, with the gross deductions therefrom (s. 240); (5) the sale of the effects of any seaman or apprentice so dying, including each article and its price (ss. 169 and 240); (6) collisions with any other ships, and the circumstances thereof (ss. 240 and 423); (7) in the case of ships bound to European or Mediterranean ports, or ships bound to the eastern ports of America, or islands or places in the Atlantic, north of 35 N. lat., any refusal by a seaman to take anti-scorbutics when served out (s. 200); (8) in the case of British sea-going ships, the ship's draught of water and clear side before going to sea (s. 436 (3)); (9) in the case of foreign-going ships, a statement of the distance between the load-line and the upper edge of each of the deck-lines above it (s. 440 (4)).

Entries may also be made in the official log by the proper officers who examine provisions or water of a ship on the complaint of the crew that they are of bad quality, unfit for use, or deficient in quantity, of the result of that examination (s. 198); and the orders of a naval Court with regard to any complaint brought before it by a master, mate, or seaman, or made in the interest of the owner of ship or cargo, or any investigation into the loss or wreck of a British ship, are to be entered into the official log-book of the ship to which the parties to the proceedings before the Court belong (s. 483 (3)).

If official logs are not kept or entered up as required, the master is liable to a fine of £5; such an entry in an official log relating to an event happening before the arrival of the ship at her final port of discharge more than twenty-four hours after that time is punishable with a fine of £30; wilful destruction or mutilation of an entry in an official log, or making a false or fraudulent entry in, or omission from, an official log is a misdemeanour (s. 241). The official log of a foreign-going ship must be delivered by the master within forty-eight hours of the ship arriving at her final destination in the United Kingdom, or the discharge of the crew, whichever comes first, to the superintendent before whom the crew is discharged; in the case of a home-trade ship for which an official log is required, the master must send it every 30th of June and 31st of December or three weeks thereafter, made up for the preceding half-year, to a superintendent in the United Kingdom; and non-compliance in both these cases, whether by owner or master, is punishable with the same penalty as failure to deliver a list of the crew (s. 242). In case of the transfer of a ship, whether as regards ownership or employment, and in case of her loss or abandonment, the official log duly made up to that time must be sent to the superintendent at the port to which the ship belonged, under penalty of £10 (s. 243). See CREW.

Entries of desertion in the official log-book are proof of desertion in proceedings for forfeiture of wages (s. 231). Superintendents, when required by the Board of Trade, must produce to it or its officers all official log-books delivered to them (s. 715); and officers of the Board are, among others, empowered to require the production of the official log-books or other documents relating to the crew, to summon the master to explain anything

in the official log-books, and to take copies of them or any part of them, under a £20 penalty (s. 723).

Ships belonging to general lighthouse authorities and pleasure yachts are exempt from these provisions as to official log-books (s. 262 (*i*)).

The master of a British ship, registered or not, is also bound to record in his log-book any birth or death happening in his ship, and particulars thereof (s. 254).

In collision actions (in spite of s. 239 (6), above) official logs and ordinary logs are not evidence *for* the ships in which they are kept, though they are *against* them (*The Singapore*, 1866, L. R. 1 P. C. 378; *The Henry Coxon*, 1878, 3 P. D. 156, ship's log, though the master and mate were both dead; *The Earl of Dumfries*, 1885, 10 P. D. 31, engineer's log; Marsden, *Collisions*, 335 and 336). But books containing entries by the coastguard and sent to the coastguard office have been admitted in evidence to prove the state of the wind and weather at the time of a collision (*The Catherina Maria*, 1866, L. R. 1 Ad. & Ec. 53); and entries in lighthouse logs have been admitted for the same purpose (*The Maria des Dores*, 1863, B. & L. 27).

London Chamber of Arbitration—A chamber of arbitration set up in 1892 by the Corporation of the City of London, and controlled by a joint committee of twelve appointed in equal proportions by the Corporation and the London Chamber of Commerce. The object of the chamber was stated to be "the speedy and inexpensive settlement of disputes arising in the course of business without having recourse to litigation." Parties submitting their disputes to this chamber may have them disposed of either by one arbitrator, two arbitrators and an umpire, or three arbitrators, selected from a large body of approved arbitrators conversant with commercial matters; a legal assessor is also attached to the chamber, whose services can be obtained when necessary. The fees to arbitrators and the other costs payable are small. The success of this attempt to provide a popular tribunal of commerce has been very slight, and since the provision in the High Court of a Commercial Court (*q.v.*) there has been less necessity for it.

London City.

TABLE OF CONTENTS.

PRELIMINARY 11
AREA AND POPULATION . . . 12
ADMINISTRATION 12
The Lord Mayor 12
The Court of Common Council . 13
The Court of Common Hall . . 15
Corporate Officers 15
JUDICIAL ARRANGEMENTS . . 15
1. Criminal Justice . . . 15
Summary 15
Quarter Sessions 16
Central Criminal Court . . 16
2. Civil Justice 16
High Court 16
Mayor's Court . . . 16
City of London Court . . 17
POLICE 18
POOR LAW 18
PROPERTY AND FINANCE . . . 18

PRELIMINARY.

The city of London is at once the most ancient municipal corporation in England and the only one which has not been brought under the Municipal Corporation Acts. It was deliberately excluded from the Act of 1835. Its constitution and affairs formed the subject of full

examination in the report by the Royal Commissioners in 1837; without any result in legislation.

In 1855, after the report of a fresh Commission in 1853, the Metropolis Management Act, 1855, transferred certain administrative functions of the city authorities to the Metropolitan Board of Works, from which they have passed to the London County Council (see LONDON COUNTY). Further inquiries have since been made, culminating in the Local Government Act, 1888, which has further affected the city in certain matters which will be presently considered in detail; and in 1894 a Commission sat and reported on the feasibility of amalgamating the city with the county of London, in which much evidence was taken as to the history and constitution of the city. The report is Parl. Pap. 1894, C. 7493. An extremely full statement by the city authorities was laid before the Commission.

Origin.—The city has been a separate franchise or county for a period beyond living memory. It was governed by an alderman (eorlderman) as early as 886, and by a port-reeve and bishop at the Conquest, and possessed even at that date corporate rights independently of any charter as a distinct *civitas* or *communitas*, possibly derived from its history as a Roman *municipium*. It has since the Conquest received many charters dating from William I. (a list of these charters is given by Mr. E. A. Jelf in his articles on London, L. T. Jo.); and in 1191 the government, if it had previously been in the nature of a shire, was made or recognised as a *communa* governed by a mayor; and the right to elect one annually was given by charter in 1215.

AREA AND POPULATION.

The area of the city is 671 acres only. It comprises the space within the old city walls, and certain liberties outside that area; and the city or borough of Southwark is in what may be termed a semi-detached condition.

The area is divided into twenty-five wards, for each of which (except that of Bridge Without) a wardmote exists, held for election on St. Thomas's Day, December 21. A grand Court of Wardmote is held annually on Plow Monday to receive and consider the returns of the different wards.

Its sleeping population is about 37,000; its day population over 300,000.

ADMINISTRATION.

The Lord Mayor.—The council is presided over by a Lord Mayor, who is selected from among the aldermen who have also served the office of sheriff. He is elected on September 29, in common hall, by the liverymen, and admitted and sworn in on November 8 (1751, c. 30, s. 4), and on that day presented to the Lord Chancellor. On November 9 he is presented to the High Court in lieu of the old Court of Exchequer, on which his induction into office is complete (1750, c. 24, s. 48; 1881, c. 68, s. 17). He has the powers of lord lieutenant for the city, and is summoned to the Privy Council on the demise of the Crown.

Virtute officii he is entitled to the right of special access to the sovereign, and to present petitions at the Bar of the House of Commons.

He is perpetual escheator and coroner for the city of London and Southwark, and is clerk of the markets, and admiral of the port of London, and he was, until 1894 (57 & 58 Vict. c. clxxxvii.), chairman of the Thames Conservancy.

He presides *virtute officii* (1) over the Court of the Mayor and Aldermen

of the Inner Chamber, commonly called the Court of Aldermen; (2) over the Court of Common Council, and summons and usually attends all the meetings, but may appoint an alderman to act as his deputy. His importance and functions correspond rather to those of a continental Maire or Burgomaster than to those of a mayor of an ordinary English municipal borough.

The Court of Aldermen.—The aldermen of London are twenty-six in number, each elected *ad vitam aut culpam* (17 Rich. II. c. 2) for one of the twenty-six city wards, by the electors qualified to vote for common councilmen. Southwark, or the ward of Bridge Without, has no constituency, and the senior elected alderman usually succeeds to the aldermanship of this ward.

The Court of Aldermen consists of all the aldermen, presided over by the Lord Mayor or his *locum tenens*, which sits in public, with a quorum of thirteen. The Court is of record, and its proceedings have been regularly recorded and kept since 1495. It has four standing committees for (1) general purposes, (2) gaols, (3) privileges, (4) finance, each composed of all the aldermen, but having a quorum of three. The committee have a limited power of authorising payments.

The Court has the appointment—

(1) Of visiting justices for Newgate and Holloway gaols (1877, c. 2);

(2) Of the recorder, subject to approval by the Crown as to his judicial duties (1888, c. 41, s. 42 (14));

(3) Of the steward of Southwark;

(4) Of the clerks and officers of the City Police Courts;

(5) Of two members of the Court to sit on valuation appeals (1888, c. 41, s. 42 (10)). It has also the removal in case of misconduct of the city commissioner of police.

The general powers of the Court are—

(*a*) Jurisdiction over the livery companies or trade guilds;

(*b*) Jurisdiction to appoint special constables;

(*c*) Cognisance as to election and return of all persons selected for office at a wardmote. They may even reject an improper person elected by a ward, and the disqualifications for election are stated in an Act of 1851 (14 & 15 Vict. c. xv. s. 9). An alderman can be removed if insolvent (1849, c. xciv.);

(*d*) Regulation of the city police force.

They have power to authorise expenditure and payment of money relative to their special duties, by orders on the city chamberlain.

Each alderman has the rule and government of his ward, and presides at its meetings by himself or his deputy, and signs the lists of qualified ward electors (1860, c. i. s. 5).

The Court of Common Council.—The administrative body of the Corporation of the City of London, except as elsewhere stated, is the Court of the Lord Mayor, Aldermen, and Commoners of the City of London in common council assembled, usually styled the Court of Common Council.

It can be traced as existing in 1273. Its numbers have varied from time to time, and it was for a time elected by trade guilds, but since 1384 has been elected by the wards.

It consists of the twenty-six aldermen and two hundred and six common councillors, presided over *ex officio* by the Lord Mayor.

The councillors are elected for the twenty-five wards by (1) voters on the parliamentary register for the city, including £10 occupiers, householders, lodgers, servants, and liverymen of the City Guilds, who have become freemen of the city; and (2) persons who, if resident, would have

been on the parliamentary register (1867, c. 5; Parl. Pap. 1894, C. 7493, i. p. 192). The candidates are nominated on St. Thomas's Day, December 21, and the election, if contested, is on the next day, and the poll is by ballot (50 & 51 Vict. c. xiii.).

The qualification for election is regulated by a local Act (1849, c. xciv. ss. 5, 9). The office is annual. The elections are subject to Part 4 of the Municipal Corporations Act, 1882 (c. 50), and to the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (c. 70, s. 35).

The quorum of the council is forty, including two aldermen, and the Lord Mayor or his *locum tenens* must be present.

The procedure is regulated by Standing Orders.

The Court appoints numerous committees for special business: thirty in 1894. They have been recast in view of the transfer of the powers of the Commissioners of Sewers in 1898 (60 & 61 Vict. c. cxxxiii.).

They appoint all corporation officers except those appointed by the Courts of Aldermen or of Common Hall; and the election of many paid officers is annual (60 & 61 Vict. c. cxxxiii.).

In 1898 the Common Council took over all the powers and duties of the Commissioners of Sewers created by local and general Acts beginning from 1666, and now discharges all municipal functions, except those exercised by the Court of Aldermen and the London County Council.

They fall into three classes—

1. Those possessed by or transferred to vestries or district boards in other parts of the administrative county—

Adulteration and sale of food.
Baths and washhouses.
Burial grounds.
Cleansing and lighting (1848, c. clxiii.; 1851, c. xci.).
Highways.
Public health (1891, c. 76, s. 133).
Public libraries and museums.
Sewers (other than main).
Technical instruction (1889, c. 76; 1891, c. 4).

2. Those possessed in other parts of the county by the County Council—

Bridges (Blackfriars, London, Southwark, Tower).
Buildings (1894, c. ccxiii. ss. 164, 165).
Contagious diseases (home animals) (1894, c. 58).
Dairies (1891, c. 76).
Dangerous structures (1894, c. ccxiii. s. 104).
Explosives (storage).
Gas (testing).
Infant life protection (1897, c. 57, s. 15, Sched.).
Locomotives on highways (1878, c. 77).
Lodging houses for working classes (1890, c. 70).
Lunatic asylums (1890, c. 5).
Offensive trades (1891, c. 76, s. 19).
Open spaces (1863, c. 13, s. 1; 1877, c. 35, s. 7; 1881, c. 34, s. 12).
Overhead wires (1891, c. lxxvii. s. 4).
Petroleum (1871, c. 105; 1879, c. 49; 1889, c. 47).
Reformatories and industrial schools.
Shop hours regulation (1892, c. 62).
Sky signs (1894, c. ccxiii. s. 128).
Slaughter houses (37 & 38 Vict. c. 67; 1891, c. 76, s. 142).
Street improvements (1817, c. xxix.).
Tramways.
Unhealthy areas (1890, c. 70).
Water supply (supervising) (1871, c. 113).
Weights and measures.

3. Those possessed by no authority in other parts of the administrative county—

(*a*) Port sanitary authority (1891, c. 76, s. 111), including importation of foreign animals.

(*b*) Markets. See LONDON COUNTY.

The Court of Common Hall.—The full style of this Court is "the meeting or assembly of the mayor, aldermen, and liverymen of the several companies of the city of London in common hall assembled." The Court consists of the Lord Mayor or his *locum tenens*, four aldermen at least, the sheriffs, and all the freemen of the city (about 9000) who are liverymen of the seventy-six city companies which have a livery. They are the surviving representatives of the commonalty of the city *en masse*, dating from a time when all citizens had to be members of a guild.

Its functions are—

(1) To nominate two aldermen for the Court of Aldermen to select a Lord Mayor;

(2) To elect the sheriffs, city chamberlain, bridge masters, and auditors of the chamberlain's and bridge masters' accounts (Parl. Pap. 1894, C. 7463, i. pp. 200, 201). In other words, it is a body for election and audit, and not for administration. It meets at the Guildhall (which at an early date became the common hall or town hall) twice a year, on June 24 and September 29. The elections are by show of hands, or, if demanded, by poll, under the City of London Ballot Act, 1887.

Corporate Officers.—The recorder is elected by the Court of Aldermen, but may not discharge judicial duties unless approved by the Crown (see CENTRAL CRIMINAL COURT). He is at once judge and chief law officer of the city.

The common serjeant will henceforth be appointed by the Crown (see COMMON SERJEANT).

The city remembrancer is elected by the Court of Common Council annually. Apart from his ceremonial duties, he acts as parliamentary agent for the corporation, and as law adviser.

The city chamberlain is elected by the Court of Common Council annually. He is the head of the Chamber of London, and is responsible for the city accounts. He also keeps the roll of freemen, and a Court for determining differences between masters and apprentices, taken under the custom of London, is held before him and the comptroller, with power to imprison for not over three months in Bridewell, subject to appeal to the Mayor's Court.

The two sheriffs are elected annually by the Court of Common Hall, subject to approval by the Crown. Until 1889 (1888, c. 41, ss. 41 (8), 42 (6) they also acted as sheriffs of Middlesex, which was let to farm to the city.

The secondary is elected annually by the Common Council. He acts as under-sheriff and as bailiff for Southwark, and executes writs of inquiry, and hears compensation cases under the Lands Clauses Acts.

JUDICIAL ARRANGEMENTS.

1. *Criminal Justice.—Summary.*—The only justices of the peace qualified to act and acting for the city of London, are the Lord Mayor and an alderman, who, by their election, become justices by charter 15 Geo. II. In other municipal boroughs of England, the mayor and ex-mayor are the only *ex officio* justices. An alderman of London may, like a stipendiary

magistrate, sit alone to deal with matters which must in other cases be done before two justices. This right has existed since 1600 (42 Eliz. c. 2), and is recognised by the Indictable Offences and Summary Jurisdiction Acts. Two Courts sit daily in the city at the Mansion House Justice Room, one before the Lord Mayor, and at the Guildhall Justice Room, presided over by the alderman on the rota. At this Court summonses under the City Police Acts are taken twice a week. The procedure is regulated by the Indictable Offences Act, 1848, and the Summary Jurisdiction Acts.

Quarter Sessions.—The City Court of Quarter Sessions is styled the Court of the Lord Mayor and Aldermen of London. It was created by charter in 1462, and consists, under charter of 1742 (15 Geo. II.), of the Lord Mayor, aldermen, and recorder. It seems to be confused in the Local Government Act, 1888, s. 100, with the Court of Aldermen.

It sits usually eight times a year to hear appeals and deal with estreats (1822, c. 46) and for other business; but indictable offences committed in the city are tried at the CENTRAL CRIMINAL COURT. The quorum consists of the Lord Mayor or his *locum tenens* or the recorder and at least three aldermen. Appeals are rare (Parl. Pap. 1894, C. 7493, i. pp. 248, 249).

The aldermen as justices administer the Licensing Acts (1872, c. 94, s. 74; 1874, c. 49). The aldermen of the ward in which the premises affected lie, make a special report on the propriety of the application. They do not hear rating appeals, but two members of Court, selected by the Court, may sit at the London County Sessions as members of the Court to hear any valuation appeal as to property in the city (1888, c. 41, s. 42 (10)); those which would, in the case of an ordinary Quarter Sessions borough, pass to the town council, have been transferred to the Common Council (1888, c. 41, ss. 35, 41 (1) (*a*) (2)). Those which in such a borough would pass to a County Council have passed to the London City Council (1888, c. 41, ss. 3, 35, 41 (1) (*b*)). The justices and Quarter Sessions of the new county of London have no jurisdiction in the city of London, but a commission conferring such jurisdiction can be issued by the Crown, with the assent of the mayor, commonalty, and citizens (1888, c. 41, s. 40 (3)).

Central Criminal Court.—The history and constitution of this Court is dealt with under the title CENTRAL CRIMINAL COURT, vol. ii. p. 413. The Lord Mayor and all the aldermen, and the recorder and common serjeant, and the present judge of the City of London Court are justices of this Court.

2. *Civil Justice.—High Court.*—Special sittings of the judges of the Superior Courts for the trial of actions were held at the Guildhall until the transfer of the Superior Courts from Westminster Hall to the Royal Courts of Justice. They were then discontinued for a time, and London sittings at the Royal Courts substituted. They were resumed with the object of dealing with commercial business under 54 & 55 Vict. c. 14.

This experiment failed, mainly through the action of judges and counsel, and the sittings were discontinued, and their place has been taken mainly by the Commercial Court (see R. S. C. 1891, Order 36, rr. 29 *a*, 29 *b*).

Mayor's Court.—The Mayor's Court is an ancient Court of record held by custom in the outer chamber of the Guildhall, having equitable as well as common law jurisdiction by custom and statute and exclusive jurisdiction as to many causes arising out of city customs. The jurisdiction has been extended under the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.; the Judicature Act, 1873, c. 66, s. 89), and by orders under the Arbitration Act, 1889, and the Partnership Act, 1890 (St. R. & O. 1892, pp. 518, 520). The mayor and aldermen are the nominal judges, but the Court is held before the recorder (or, in his absence, by the common serjeant) or by an

assistant judge appointed by the recorder (under 35 & 36 Vict. c. 86, s. 7). It has also registrars who are the taxing officers, and serjeants at mace to execute process.

It has jurisdiction (concurrent with the High Court) to any amount in personal actions (but not in replevin), subject to a power to remove the case by certificate of the claim, if the case is fit to be tried in the High Court (*Banks* v. *Hollingsworth*, [1893] 1 Q. B. 442). But the cause of action must arise wholly or in part within the city, except in actions for debt and damages not exceeding £50, where the defendant or one defendant dwelt or carried on business in the city when the action was brought, or six months next before it was brought (see *Read* v. *Brown*, 1888, 22 Q. B. D. 128; 1857, c. clvii. s. 12).

Its powers as to FOREIGN ATTACHMENT are dealt with in vol. v. p. 412. Where it proceeds without jurisdiction, the remedy is by writ of prohibition, which is of right before judgment, but discretionary afterwards (*Broad* v. *Perkins*, 1888, 21 Q. B. D. 533; *Bowler* v. *Barberton Syndicate*, [1897] 1 Q. B. 164), or by plea to the jurisdiction in actions for more than £50.

The procedure is regulated by the Act of 1857, and rules made in 1892 (St. R. & O. 1892, p. 498) under the Local Courts of Record Act, 1872, and the costs are regulated by an order of 1890. The pleadings in use are those of the Courts of Chancery and Common Law before the Judicature Acts (see CONCESSIT SOLVERE, vol. iii. p. 243). The Court itself can grant new trials. Appeals lie from a final judgment on claims over £20, on giving security for costs (*Morgan* v. *Bowler*, [1894] 1 Q. B. 236). They lie —(1) in case of error on the record, *e.g.* demurrers, to the Court of Appeal (*Le Blanch* v. *Reuters*, 1876, 1 Ex. D. 408); (2) in other cases to the Queen's Bench Division (1873, c. 66, s. 43).

The proceedings on appeal are regulated by R. S. C. 1883, Orders 58, 59, and are no longer by special case. Leave to appeal from the Court below is needed where the claim is under £20 (*Eder* v. *Levy*, 1889, 17 Q. B. D. 210. As to time for appeal, see *Kirby* v. *North British and Mercantile Insurance Co.*, [1896] 2 Q. B. 99).

The business of the Court is very considerable, and it has been proposed to extend its jurisdiction to the whole county of London. The very numerous decisions on its practice are collected in Glyn and Probyn's *Mayor's Court Practice* (see *Hall* v. *Launspach*, [1897] 1 Q. B. 573).

The City of London Court was created by the City of London Small Debts Extension Act, 1852 (15 Vict. c. lxxvii.). Under that Act it took over business discharged by the now disused customary Sheriffs Courts for the Poultry Compter and the Giltspur Street Compter. It received the name of the City of London Court in 1867 (c. 142), and is now to all intents and purposes a County Court, and the judge, hitherto elected and paid by the Common Council, will for the future be appointed by the Crown (1888, c. 41, s. 42 (14); c. 43, s. 185), but has under its special Act jurisdiction where the defendant is "employed" in the city, or has been so within six months of accrual of the cause of action (*Kutner* v. *Phillips*, [1891] 2 Q. B. 267).

The registrar is appointed by, and accountable to, the Common Council. The Court has acquired Admiralty jurisdiction, and jurisdiction to wind up companies, and has jurisdiction in certain cases of city municipal elections (1887, c. xiii.). The judge can appoint a deputy (1872, c. 86, and 1888, c. 43).

The fees of the Court go to the corporation. Since 1871 they have been the same as in other County Courts (1871, c. iii.).

The Court of Hustings existed at the Conquest. It was held before the mayor and sheriff as County Court for the city (1) for pleas of land, (2) for common pleas, and (3) on appeal from the Sheriff Court. It also was the Court of Probate and registry of wills and deeds in the city; but enrolment of wills ceased in 1668. Its abolition was proposed in 1867 and 1871 (Parl. Pap. 1894, C. 7463, i.; City Statement, pp. 96–98). It is not extinct, and could still be used for registration. Its records are at the Guildhall.

Police.

The city of London maintains a separate police force under local Acts. The force is under the command of a commissioner appointed by the Common Council, subject to approval of the Crown, but removeable by the Crown or by the Court of Aldermen, with his consent, for misconduct. The organisation of the force, including the appointment and dismissal of constables and the regulation of traffic, is in the hands of the commissioner, subject to regulation by the Court of Aldermen and the Home Secretary (1839, c. xciv. s. 3; 1863, c. ccvi.; 1867, c. 134).

The City Police Act, 1839 (c. xciv.), closely resembles the Metropolitan Police Act, 1839 (c. 47), but contains a few special provisions for offences.

The expense of the police force is paid, one-quarter by the Common Council out of the corporate funds, and three-quarters by police rate levied on the wards; subject to a contribution from the Local Taxation Grant.

There is also a Police Committee of the Common Council (somewhat similar to the Watch Committee of an ordinary borough), whose duties are—

(1) To appoint a police surgeon, and receive and fix the number of the police force;

(2) To provide and build police stations;

(3) To provide accoutrements and pay pensions;

(4) To regulate the police rates for each ward.

In regard to regulations as to fire, fire curtains, etc., see London County.

Poor Law.

The city is a poor law union for which guardians are elected, now under the provisions of the Local Government Act, 1894.

It contributes to the Metropolitan Common Poor Fund, and is represented on the Metropolitan Asylums Board.

The guardians receive the precepts of the London County Council for levy of the portion of the rate of the administrative county leviable on the city, and it is collected by the overseers of the city parishes (Parl. Pap. 1894, C. 7493, p. 48).

If the overseers fail to pay union contributions, they are dealt with by the aldermen acting as justices, under the Poor Rate Act, 1839 (2 & 3 Vict. c. 84, s. 1).

Questions of poor law settlement are dealt with by two aldermen at the Guildhall Police Court.

Property and Finance.

The corporate expenses of the city are paid out of the city cash. Consolidated rates, sewers rates, and police rates are also levied.

The corporation can borrow without statutory authority on its corporate property.

Annual accounts are prepared and submitted to the Common Council, and audited by auditors elected in Common Hall.

The details of city finance are extremely complicated, and are dealt with by the Report of the Commission of 1894.

Southwark.—The city or borough of Southwark has an imperfect connection with the city of London. The borough was granted to the city by charters beginning in 1327, and confirmed and extended in 1550. Administrative jurisdiction has never been exercised. The borough is represented in the corporation by the alderman of the ward of Bridge Without, who is chosen by the other aldermen, and has no constituency.

The aldermen who have passed the chair are unpaid justices for the borough, and at one time daily sittings were held, but the Surrey county justices successfully claimed concurrent jurisdiction, and the magisterial business for the borough is now done by a metropolitan police magistrate at the Southwark Police Court; the committals for indictable offences within the area under the city being, however, to the Central Criminal Court.

Quarter Sessions for Southwark were at one time held by the Recorder of London, and the grand jury is still summoned, but no business is done.

The city appears to be lord of the manor, and possesses estates in the borough. A Steward's Court or Court Leet was held on behalf of the corporation; the steward or bailiff is appointed by the corporation, at present the Secondary of London. The office is now almost nominal, but presentments are occasionally made (Parl. Pap. 1894, C. 2651–2655).

There was also a Borough Court of Record held before the recorder as High Steward, now fallen into disuse, which could try actions of debt, contract, and trespass to any amount arising in the borough.

An unsuccessful attempt was made in 1896 to add Southwark by local Act to the city of London.

[*Authorities.*—Pulling on *City of London*; Parl. Pap. 1894, C. 7493.]

London County.

TABLE OF CONTENTS.

I. Creation and Area . . 19
II. Judicial Arrangements . 20
III. Municipal Administration . 21
(*a*) Preliminary . . . 21
Central Authority . . 22
Constitution . . 22
Powers . . . 22
Finance . . . 26
(*b*) Local Authorities . . 26
Constitution . . . 26
Powers 28
Finance 30
IV. Education 30
(*a*) Elementary . . . 30
(*b*) Secondary and Technical 30
V. Police 31
VI. Poor Law 31
(*a*) Local Administration . 31
(*b*) Central Authority . . 33
VII. Valuation and Rating . 33

I. Creation and Area.

Under the Local Government Act, 1888 (c. 41, s. 40 (1)), a new county was carved out of the ancient counties of Middlesex, Kent, and Surrey, and was constituted a county in the full sense of that term, under the name of the County of London, with a lord lieutenant and *custos rotulorum*, and with a sheriff nominated by the Crown (1888, c. 41, s. 40 (2)). The ancient liberty of the Tower of London was merged in this county by sec. 48 of the Act of 1888. The city of London was and is a county separated from the ancient county of Middlesex, and has not been, though it can be, merged in the county of London (1888, c. 41, s. 40 (3)); but for certain

administrative purposes it is combined with that county into an area described as the administrative county of London (1888, c. 41, s. 40 (1) (2)).

II. Judicial Arrangements.

(*a*) *Civil Business.—Supreme Court.*—The fixed and continuous sittings of the Supreme Court are held in the administrative county of London at the Royal Courts of Justice, except in the case of the Guildhall sittings (see London City), subject to the rules for the time being of the Supreme Court.

The counties of London and Middlesex are treated as one county for all legal proceedings, civil and criminal, in the Supreme Court or Central Criminal Court, or any Court except of Quarter Sessions and for juries (1888, c. 41, s. 89 (3)).

The County Juries Act, 1825, and its amending Acts, apply to both counties, and the old exemption of juries of Westminster from service on county juries is abolished. This provision does not affect city of London jurors (1825, c. 50, ss. 49, 50; 1870, c. 77, ss. 6, 25; 1888, c. 41, s. 89 (2)).

County Courts.—The County Courts in the city of London and the county of London are unaffected by the Act of 1888 (see County Court, vol. iii. p. 527), and as yet the style of the Courts has not been altered, *i.e.* they remain the County Courts of Kent, Middlesex, or Surrey holden at Bow or Brompton, etc.

Other Civil Courts.—Writs of inquiry and other proceedings formerly dealt with by the under-sheriffs of Kent, Middlesex, or Surrey as to matters within the county of London, are now dealt with before the under-sheriff of the latter county, except in Westminster, where under the Lands Clauses Acts they are held before the high bailiff. For the city they are held before the secondary. See London City.

(*b*) *Criminal Business.—Supreme Court.*—In this Court criminal proceedings as to matters in the county are affected by the Act of 1888 only to the same extent as civil proceedings (see above). Special commissions of assize, oyer and terminer, and gaol delivery are not issued for this area.

Central Criminal Court.—This Court has been dealt with in vol. ii. at p. 413.

Quarter Sessions.—The new county of London has been granted a separate commission of the peace and Court of Quarter Sessions (1888, c. 41, s. 40 (2)). The liberty of the Tower was for judicial purposes extinguished by Order in Council of April 30, 1894, and the city of Westminster was for such purposes wholly merged in the county in 1889 (1888, c. 41, ss. 89, 117). The jurisdiction of the Court is the same as that of any other County Court of Quarter Sessions, but it has also acquired the powers and duties of the general assessment sessions formerly held under the Metropolis Valuation Acts (1888, c. 41, s. 42 (10)). It has no jurisdiction except on assessment appeals over the city of London (1888, c. 41, ss. 40 (3), 42 (10)).

The sittings of the Court are regulated by an order of the County Council approved on March 24, 1892, by the Home Secretary (1888, c. 41, s. 42 (6)), and printed in Hunt on *London Local Government*, vol. ii. p. 1146.

The Court differs from that of the other counties in that they may have as a paid chairman and deputy chairman, barristers of not less than ten years' standing. They are appointed by the Crown on the petition of the council, and hold office during good behaviour, and receive a salary and retiring pension. They are justices *ex officio* for the county, and each can hold the Court alone without the presence of other justices (1888, c. 41, s. 42; 1896,

c. 55). The costs of the Central Criminal Court and of Quarter Sessions in the administrative county are paid by the County Council out of the county fund (1888, c. 41, ss. 41 (5), 100).

Courts of Summary Jurisdiction.—(*a*) These are held in the city of London before the Lord Mayor or an alderman (see LONDON CITY), and appeals from them are to the city Quarter Sessions. (*b*) The rest of the administrative county is in the METROPOLITAN POLICE DISTRICT (*q.v.*), and the bulk of the business is done at the Metropolitan Police Courts before the paid magistrates, who have all the powers of two unpaid magistrates, except as to matters dealt with in SPECIAL SESSIONS. But the unpaid justices, acting for each petty sessional division of the county, deal with all the business relating to the grant of licences for intoxicants, and may, and, in some districts whether within a Police Court Division or not, do deal with matters arising under the Acts, giving summary jurisdiction other than the Metropolitan Police Acts, especially with reference to public health, weights and measures, and proceedings under the poor law or for rates. They have exclusive jurisdiction as to liquor licences (except as to protection orders), game licences, certain poor law matters, jury lists, and valuation appeals against individual assessments; and under orders of Quarter Sessions certain justices act in making orders under the Lunacy Acts, 1890 and 1891. Appeals from paid or unpaid justices, whether as a licensing authority or a Court of summary jurisdiction, go to the county of London Quarter Sessions.

Coroners.—The functions of coroners in the administrative county are the same as in the rest of England (see CORONER, vol. iii. p. 411), except that in the city of London they have powers to hold inquests as to the causes of fires (1888, c. xxxviii.), and to commit for trial on an inquisition charging arson. The coroner for the city and Southwark is the Lord Mayor, but the deputy and acting coroner is appointed and paid by the Corporation of the city; those of the city of Westminster (appointed by the Dean and Chapter of Westminster), the liberties of the Tower (appointed by the Constable of the Tower), and the Savoy (appointed by the Crown in right of the Duchy of Lancaster), are franchise coroners (1887, c. 71, ss. 30, 42), and not appointed by the County Council (*Ex parte London County Council*, [1892] 1 Q. B. 33). The coroner of the Queen's Household is appointed by the Lord Steward (1887, c. 71, s. 29) for the royal palaces and the verge. For the rest of the administrative county the coroners are appointed and paid, their districts fixed, and the costs of inquests regulated and paid by the County Council (1888, c. 41, s. 5 (1); and see 1892, c. 56).

III. MUNICIPAL ADMINISTRATION.

(*a*) *Preliminary.*—The ancient limits of the city of London and its liberties were never extended so as to include any of the urban communities which formed in the adjacent parishes of Middlesex, Kent, and Surrey, and the same applies as to the ancient city of Westminster. The result was that in an enormous number of extra-mural areas, governing bodies were created by a series of improvement Acts, appearing in the general statute-book till 1800, and since then among the local Acts.

Michaelangelo Taylor's Act (57 Geo. III. c. xxix.) made, as to many of these communities, general provisions for lighting and paving and street improvements. But under the Municipal Corporations Act, 1835, neither the cities of London and Westminster nor any of the extra-mural parishes were made into a municipal borough, although various and shifting areas have been constituted parliamentary boroughs (1885, c. 23, Sched. 6); and

the Municipal Corporations Acts, 1882 and 1883, are so framed as not to permit the creation of any new municipal borough within the county of London.

In consequence of the report of a Commission in 1853, the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), was passed, which created a central authority, the Metropolitan Board of Works, and local authorities, described as Vestries and District Boards. The area dealt with by the Act was described as the Metropolis, a term now superseded by that of the administrative county of London. It includes the city of London, which, for the purpose of the central authority, elected representatives to the Metropolitan Board, and for local purposes was represented by the City Commissioners of Sewers, now extinguished, and superseded by the Court of Common Council (see LONDON CITY); and the area also comprised the districts specified in a table presently to be given under *Local Authorities*.

Central Authority.—(*a*) *Constitution.*—The central authority for the administrative county of London is the London County Council (1888, c. 41, s. 40), a corporate body, which consists—(1) of a chairman, who is *ex officio* a justice of the peace for the county of London; (2) of nineteen aldermen elected by the council (1888, c. 41, s. 40 (5)); (3) of one hundred and eighteen councillors, of whom two are elected for three years by the local government electors of each of the parliamentary divisions of the administrative county, except the city, which elects four (1888, c. 41, s. 40 (4)). The qualifications for electors and elections and the mode of election are the same as in other counties (1888, c. 41, ss. 1, 2), and are dealt with under COUNTY COUNCIL, vol. iii. p. 525; and ELECTIONS, vol. iv. p. 471; and see Mackenzie and Lushington, *Registration Manual*, 2nd ed., 1897; Rogers on *Elections*, 17th edition. Its procedure is regulated by the Municipal Corporations Act, 1882, as amended by a local Act of 1893 (c. ccxxi.). The relevant clauses are printed in Hunt, *London Local Government* (p. 114).

(*b*) *Powers, Duties, and Liabilities.—General.*—The County Council acquired under the Act of 1888 the administrative powers of the Quarter Sessions of Middlesex, Kent, and Surrey over the areas of those counties which have been united into the administrative county of London, and such of the powers of the Court of Aldermen and justices of the city of London as would in the case of an ordinary Quarter Sessions borough with a population over ten thousand not pass under the Act of 1888 to the council of the borough (1888, c. 41, ss. 4–7, 8, 10, 11, 40 (6) (7), 41).

They also acquired under the same Act (1888, c. 41, s. 40) all the powers, duties, and liabilities of the Metropolitan Board of Works under the Metropolis Management Act and certain special Acts. The result of this and other legislation is an enormous complexity of arrangement and multiplicity of duties dealt with in detail in the evidence and report on Unification (Parl. Pap. 1894, C. 7493), and indexed so far as it is in the general statute-book in the Official Index to the Statutes. In fact the council may be said to have a power or duty on a subject beginning with every letter of the alphabet, and the local authorities almost as many, and that they are not arranged as yet on any clear system of distribution. Within the limits of this article it is only possible to give a *résumé* of these powers.

Animals.—The council is the authority under the Diseases of Animals Act, 1894, c. 58, except as to foreign cattle, which are dealt with by the city of London as port authority; and makes and enforces sanitary by-laws as to dairies, and cowsheds (1891, c. 76, s. 28). See MILK.

Buildings.—The construction of buildings in London is regulated by the London Building Act, 1894 (c. ccxiii.), and by-laws and regulations made by the County Council thereunder. The Act, which consolidated, amended, and repealed much prior public legislation, deals with the following matters:—

The formation of new streets and widening streets (ss. 6–20).

Lines of building frontage (ss. 21–31).

For purposes of frontage and width of streets special rules are made with reference to the position of external walls and external fences with reference to the centre line of the street (s. 5 (15)).

Naming and numbering of streets (ss. 32–38).

Height of buildings and open spaces about them (ss. 39–52).

Construction of buildings (ss. 53–81). This part contains the general rules of construction as to external and other walls, etc., which apply only in part to public buildings (see *Theatres*, below).

Special temporary and wooden buildings and structures (ss. 82–86).

Building operations by adjoining owners. This includes the rights of such owners with respect to party walls or structures or party fence walls (ss. 87–101).

Dangerous and neglected structures (ss. 102–117). In the city of London this is administered by the Common Council.

Building near dangerous and noxious businesses (ss. 118–121).

Dwelling-houses on land before high-water mark (ss. 122–124).

Sky signs. This is administered in the city by the Common Council (ss. 125–135). By-laws may be made on many matters affecting these subjects (ss. 164, 165).

The law as to buildings is subject to regulations and by-laws of the council administered by officers known as the superintending architect and chief engineer, and in the Building Act districts by district surveyors, appointed by the council and paid by fees under the statutory table (Sched. 3) or by salary (ss. 136–188).

Provision is made for consulting the local authorities in cases where they will be affected by the decision of the central authority, and it is the practice to consult them in many other cases. Disputes between the council or a district surveyor by reference are settled by a police magistrate (ss. 150–155), and appeals lie on certain questions to a special tribunal of appeal appointed under sec. 184 of the Act, and sitting when required at the Surveyors' Institute. Its procedure and fees and the cases where appeal lies are (except as to secs. 41, 42 of the Act) specified in the rules of the tribunal, dated March 1, 1895 (see Glen, *London Building Act*, p. 528).

The powers of the council as to buildings include the supervision of the structure of factories, but its jurisdiction is excluded from certain privileged areas and buildings, *e.g.* the Inner and Middle Temple and the Close of Westminster Abbey, and does not override the provisions of special Acts as to particular buildings, nor affect Crown buildings or police buildings (ss. 201, 202).

Explosives.—The council is the local authority under the Explosives Act; and as to petroleum, see EXPLOSIVES.

Fire Brigade.—The metropolitan fire brigade is wholly under the council. It is regulated under an Act of 1865 (see FIRE POLICE).

Floods and Rivers Pollution.—The administration of the Acts to prevent Thames floods (1879, c. cxcviii.; 1882, c. lvi.) is in the hands of the council, which is also the main sewer authority. They have no effective power for

the prevention of pollution of the Thames (*R.* v. *St. George's Vestry*, [1895] 2 Q. B. 275).

Highways and Streets.—Besides the powers as to formation of new streets, above, p. 23, the council has power to declare what roads in the county are main roads (1888, c. 41, s. 11). It has not exercised this power; and no roads are vested in or managed by it except under special Improvement Acts, or by transfer from the Crown, such as the Thames Embankments. But it has power to widen streets under the Act of 1855 (c. 120, s. 144), and in certain events under the London Building Act, 1894 (c. ccxiii. ss. 15, 23), but not under Michaelangelo Taylor's Act (1817, c. xxix.), and it is usual to proceed for this purpose by special Act.

Except in the city the council has powers of stopping obstructions or encroachments in streets (1894, c. ccxiii. s. 199).

The council, however, may make by-laws as to projections over streets, and as to plans, levels, width, surface, and inclination of new streets (1894, c. ccxiii. s. 164).

The traffic of the streets is controlled by the police (see METROPOLITAN POLICE DISTRICT), and not by the council; subject to the powers of the local authorities to deal with costermongers (*Keep* v. *Newington Vestry*, [1894] 2 Q. B. 524).

Infant Life Protection.—Outside the city the County Council is the authority to prevent baby farming (1897, c. 57; and see INFANT LIFE PROTECTION).

Lighting.—Except in the city, the council is the authority for testing the illuminating power of gas and gas meters. It has under the Electric Lighting Acts (*a*) power to obtain a provisional order to light any part of the county, which is concurrent with that of the local authority as to its district; (*b*) power to prevent grant of a provisional order for lighting to a company or private person. It is the lighting authority for the embankments and streets under its own control, and has, under a local Act, power to light them by electricity.

Markets.—The Common Council and not the County Council is the market authority, so far as any public markets are concerned, including that at Deptford for foreign cattle. This arises from an ancient monopoly; and markets not in the hands of the city exist by charter or statute with the consent of the city. But the County Council is the local authority for the enforcement of the Diseases of Animals Act, 1894.

Parks, Commons, and Open Spaces.—The parks vested in the council have been transferred by the Crown, or acquired under special Acts. General by-laws for their regulation were made by local Act in 1890 (c. ccxliii. Sched. B.). As to their powers over commons and open spaces, see METROPOLITAN COMMONS; OPEN SPACES. The council may provide music for its parks and open spaces and elsewhere (1890, c. ccxliii. s. 21; 1893, c. ccxxi. s. 18), and constables to keep order (1890, c. ccxliii. ss. 17, 18).

Sanitary Matters.—The council has two classes of powers with reference to public health—(i.) original; (ii.) appellate or supervisory.

(i.) The original powers include appointment of county medical officers of health (1888, c. 41, s. 17); making by-laws subject to approval by the Local Government Board as to (1) offensive trades; (2) the removal of noxious or fæcal matter; (3) the construction of water-closets and the like (1891, c. 76, ss. 16 (2), 19 (4), 39); and (4) the construction of drains (1855, c. 120, s. 202). The administration is in each case in the local authority.

By-laws as to (1) are in force, made by the late Board of Works

and continued by the Act of 1891 (c. 76, s. 142). By-laws were made as to (2) and (3) on 28th June 1893. By-laws have been drafted as to (4). The construction and maintenance of the main drainage throughout the administrative county (1855, c. 120) were transferred from the Board of Works.

(ii.) The appellate and supervisory powers include—

(*a*) Hearing appeals from orders of local sanitary authorities with respect to certain sanitary matters, and as to construction of drains (1855, c. 120, ss. 211, 212; 1891, c. 76, ss. 37, 41, 43).

(*b*) Power to act where a sanitary authority (outside the city) makes default in its duties under the Public Health Act, 1891, or (Part ii.) the Housing of the Working Classes Act, 1890 (unhealthy areas) (1890, c. 70, s. 45; 1891, c. 76, ss. 100, 117, 133).

(*c*) Supervision of the construction of local sewers.

(*d*) Proceedings to inquire into sanitary administration or the adequacy of a local sanitary staff (1891, c. 76, ss. 101, 107).

(*e*) In the case of infectious diseases, the council can act on default of a local authority, and in the case of epidemic disease it has a similar power, apparently concurrent with that of the Metropolitan Asylums Board (1891, c. 76, s. 85; 1893, c. ccxxi. s. 13).

Theatres, etc.—The council is the licensing authority for all theatres and places for public music and dancing not dealt with by the Lord Chamberlain. Its powers are derived from the justices (1888, c. 41, ss. 3, 41, 48), but are of an administrative and not of a judicial character; and an oath cannot be administered to applicants or witnesses.

An annual meeting is held for the grant of these licences before the theatres and music halls committee of the council, which decides on their report, rehearing the parties if desired. The procedure is subject to regulations by the council.

The matters to be considered on the application are those affecting the character of applicant and the entertainment under the Theatres Act, 1843, or the Disorderly Houses Act, 1751. The proceedings are not judicial (*Royal Aquarium Co.* v. *Parkinson*, [1892] 1 Q. B. 431).

But the council under Acts of 1878 (c. 32) and 1882 (c. lvi. s. 45) has power to require the remedy of structural defects in old theatres and places of public resort, and to make and enforce regulations in new theatres, and in places of entertainment requiring licensing (*R.* v. *Hannay*, [1891] 2 Q. B. 275), for prevention of and protection from fire, and can make a licence granted under the Acts of 1843 or 1851 provisional on compliance with the Act and regulations.

The regulations in force made on 9th February 1892 (printed in Glen, *London Building Act*, p. 491) deal *inter alia* with the structure of the theatre, the position of the lights, electric or other, the provision of fire curtains and proper and easy exits, and the position of the building with relation to other buildings.

Water Supply.—Under the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), the council is, outside the city, the authority for obtaining through the Local Government Board a constant supply in each district served by a commercial water company.

They are also empowered to incur cost in inquiries as to future supply for all London; and have incurred much expense and presented many schemes to the public and Parliament for the acquisition of the commercial water companies or of a new source of supply (1890, c. ccxliii. s. 38; 1892, c. xxx.).

Finance.—The expenses of the council are paid out of the county fund, and collected by means of a county rate. A precept is issued to the authorities specified in the table on p. 32, who make the necessary rate and collect the amount. The accounts of the council are subject to Government audit.

The council exercises borrowing powers, usually by an annual Money Act, by loans on the security of County Council stock; and employs these loans for the works specified in the Act, and by relending to the School Board or such local authorities as require loans for purposes approved by the council, *e.g.* street improvements or the maintenance of highways where wood or asphalt pavement is required, or capital expenditure on municipal buildings or mortuaries or coroners' courts is properly contemplated.

(*b*) *Local Authorities.—Area and Constitution.*—The basis of the division of the administrative county of London into districts for the purpose of local administration is, except in the case of the city of London, the parish or a group of parishes. The policy of the Act of 1855 was in the case of large and populous civil parishes to create by the direct vote of the ratepayers, instead of the common law vestry or a vestry under Sturges Bourne's Act, a corporate and elected vestry in the nature of a municipal corporation, differing mainly in that the London vestry retained the ecclesiastical title and was presided over by, and contained ecclesiastical officers, the vicar and churchwardens; while the County Council was clothed with the civic dignity attached to mayor and aldermen. In the case of smaller parishes vestries of a similar character were created, but the parishes were grouped into districts, and the functions of administration in the grouped parishes, which in a populous parish were committed to a vestry, were committed to a district Board of Works, formed by secondary election by the vestries of the grouped parishes.

As a result of the Act of 1855 and its amendments, London is thus mapped out for local administration—

(*a*) The city of London stands by itself, and is governed by the Court of Common Council (see LONDON CITY).

(*b*) Certain extra-parochial places are governed by the corporations or persons owning them, viz. Furnival's Inn, Staple Inn, the four Inns of Court, the Charterhouse, and the Close of Westminster Abbey.

(*c*) The following parishes are governed by corporate vestries—

Battersea (1887, c. 17); Bermondsey; Bethnal Green, St. Matthew; Camberwell; Chelsea; Fulham (1885, c. 33); Hackney (1893, c. 55); Hammersmith (1885, c. 33); Hampstead; Kensington; Lambeth; Mile End Old Town, Hamlet; Newington, St.; Paddington; Plumstead (1893, c. 55); Rotherhithe; St. George's, Hanover Square; St. George's-in-the-East; St. George the Martyr (Southwark); St. Luke, Middlesex; St. Martin-in-the-Fields; St. Marylebone; St. Pancras; Shoreditch; Stoke Newington; Westminster (St. James); Westminster (St. John and St. Margaret) (1887, c. 17).

The following groups of parishes and places are administered by district Boards of Works:—

District.	Parishes and Places Grouped.
Greenwich	Greenwich.
	St. Nicholas, Deptford.
	St. Paul, Deptford (including Hatcham).
Holborn	Glasshouse Yard, Liberty of.
	St. Andrew, Holborn above Bars.
	St. George the Martyr.

District.	Parishes and Places Grouped.
Holborn—*contd.*	St. Sepulchre.
	Saffron Hill, Hatton Garden, Ely Rents, Ely Place.
Lee	Charlton next Woolwich.
	Eltham.
	Kidbrooke.
	Lee.
Lewisham	Lewisham (including Sydenham Chapelry).
	Penge, Hamlet of.
Limehouse	Ratcliff, Hamlet of.
	St. Anne, Limehouse.
	St. John, Wapping.
	St. Paul, Shadwell.
Poplar	All Saints, Poplar.
	St. Leonard, Bromley.
	St. Mary's, Stratford-le-Bow.
St. Saviour's	Christchurch.
	St. Saviour (including the Liberty of the Clink).
Strand	St. Anne, Soho.
	St. Clements, Danes.
	St. Mary-le-Strand.
	St. Paul, Covent Garden.
	The Rolls, Liberty of.
	The Savoy, Precinct of.
St. Giles	St. George, Bloomsbury.
	St. Giles-in-the-Fields.
St. Olave	St. John, Horselydown.
	St. Olave.
	St. Thomas, Southwark.
Wandsworth	Clapham.
	Putney (including Rochampton).
	Streatham.
	Tooting Graveney.
	Wandsworth.
Whitechapel	Christchurch, Spitalfields.
	District of the Tower.
	Holy Trinity, Minories.
	Mile End New Town, Hamlet of.
	Norton Folgate, Liberty of.
	Old Artillery Ground.
	Precinct of St. Katherine.
	St. Botolph-without-Aldgate.
	Whitechapel (St. Mary).

District governed by a local Board of Health—

Woolwich.

The corporate vestry consists of the vicar and churchwardens of the parish *ex officio*, and a number of elected vestrymen, not less than eighteen, nor more than a hundred and twenty. The number is fixed, and may from time to time be altered, by reference to the number of rated householders (1855, c. 120, ss. 2, 5).

The elective members must be parochial electors or residents for twelve months in the parish, and are elected by the parochial electors of the parish in the same way as district councillors for an urban district which is not a municipal borough (56 & 57 Vict. c. 73, ss. 23, 31). The disqualifications are the same as for urban or rural district councils. The election takes place on a day in May, which may be fixed by the vestry (1855, c. 120, s. 7), and is regulated at present by the London Vestries Election Order, 1897 (St. R. & O. 1897), and the Elections (Hours of Poll) Act, 1885 (c. 10).

For the purpose of elections, parishes containing more than two thousand rated householders are divided into wards, and a number of members divisible by three is allotted to each ward. The original provisions on this subject (1855, c. 120, ss. 3, 5) have been modified by local Acts of 1893 and 1895 (56 & 57 Vict. c. ccxxi. s. 15; 58 & 59 Vict. c. cxxvii. s. 42), which empower the County Council, subject to the approval of a Secretary of State, to rearrange the wards.

The term of office is three years; but one-third of the elected members go out of office annually in May (1855, c. 120, ss. 9, 10). Casual vacancies are filled as in the case of district councils (56 & 57 Vict. c. 73, s. 46 (9)). Auditors are also elected annually at the annual elections for vestrymen, from persons qualified to be vestrymen, by the parochial electors (56 & 57 Vict. c. 73, s. 31 (1)).

The Local Board of Health of Woolwich, constituted under the County Public Health Acts, is in all but name and a few administrative details the same as the corporate vestry of an ungrouped parish.

The district boards are elected by the vestries of the grouped parishes by secondary election, from persons qualified as vestrymen. The election is by the vestries of the grouped parish, each of which is a ward for the purpose. The term of office is three years, but one-third goes out of office annually (1855, c. 120, ss. 31–41; 1862, c. 40; 1894, c. 73, s. 31).

The claim or right of the parson of a parish to be *ex officio* chairman of the corporate vestry was abolished in 1894 (c. 73, s. 31 (1)), and a vestry of a parish not grouped and a district board must after the annual elections at its first meeting elect a chairman for the year, who becomes *ex officio* a J. P. for the county (1894, c. 73, s. 31 (1) (2)).

The administrative vestries and district boards have power to fix their time of meeting, to regulate their business by by-laws and standing orders, and to appoint committees, and under the Public Health Act, 1891, to delegate their authority to a committee (1855, c. 120, s. 39; 1891, c. 76, s. 99; 1894, c. 73, s. 31).

They appoint the necessary officers, including a surveyor, medical officer, and sanitary inspectors. With reference to the latter the County Council and Local Government Board have powers of interference as to salary, efficiency, or on attempts to dismiss, and they made a regulation order on this subject on December 8, 1891.

The superannuation of officers is regulated by an Act of 1866 (c. 31), the powers under which are purely discretionary as to the grant or amount of allowance (*R.* v. *St. Pancras*, 1890, 24 Q. B. D. 371). The Act does not define what constitutes an "officer."

Powers.—The administrative functions of vestries and district boards fall under the following heads:—

They are surveyors of highways, and have the duty of paving, maintaining, repairing, watering, cleansing, scavenging, and lighting the streets within their districts other than those vested in the County Council under special Acts or declared by that council to be main roads (1855, c. 120, ss. 96–116; 1862, c. 102, ss. 71, 80–84; 1888, c. 41, ss. 11, 41; and 1890, cc. 54, 60). They can veto the closing up of alleys or streets (1817, c. xxix. s. 79). They are also the sanitary authority under the Public Health (London) Acts for the suppression of nuisances, subject to the interference of the County Council in case of default (1891, c. 76), and they have the supervision of bakehouses, factories and workshops, and licensed slaughter-houses, and offensive businesses, to see that they are in accordance with the sanitary regulations affecting them, and the administration of by-laws

relating to sanitary matters made by the County Council (see *Collman* v. *Mills*, [1897] 1 Q. B. 396).

They have the supervision of houses let in lodgings other than COMMON LODGING HOUSES; and are empowered under Part ii. of the Housing of the Working Classes Act, 1890, to deal with small unhealthy areas, unhealthy dwellings, and obstructive buildings (1891, c. 76).

They are the authority for scavenging the streets, and for removing dust and refuse from private grounds, and for the destruction or disposal of the refuse so collected (1891, c. 76).

They own the sewers other than main sewers, and supervise the construction and maintenance of private drains, and all plans of new drains have to be submitted to them (*Bethnal Green Vestry* v. *London School Board*, [1898] App. Cas. 190).

They have no control over commercial gas companies except where the streets are broken up to lay gas pipes (see GAS).

They are entitled under the Metropolis Water Act, 1897 (c. 56), to aid water consumers in the determination of questions of general interest with respect to the rights, duties, and liabilities of commercial water companies, and to complain to the Railway and Canal Traffic Commission where such a company has failed in its statutory duty (see WATER).

Under the London Overhead Wires Act, 1891 (c. lxxvii.), they administer by-laws made by the County Council as to the erection of overhead wires not belonging to the Crown or to electric lighting companies; and under the Telegraph Acts their consent is necessary (but can be compelled) for underground telephones or telegraph wires (*Postmaster-General* v. *London* (*Mayor*), 1898, 14 T. L. R. 222). Their consent is a condition precedent to obtaining electric lighting orders by commercial undertakers, and they can themselves undertake the electric lighting of their district.

As road authority, they have a qualified veto on the construction of tramways on their roads under provisional orders (1878, c. 78, ss. 4, 5). See article TRAMWAY.

They can also, by order of the Local Government Board, acquire all or any of the powers of a Parish Council under the Local Government Act, 1894, and the appointment independently of justices or overseers.

In some parishes the vestry have under special Acts or orders become the overseers of the parish (see POOR LAW, below), and in many parishes the powers of the Local Government Act, 1894 (s. 33), have been acquired, with the result of giving the vestries a measure of control over local charities, and of giving them the complete control of the administration of adoptive Acts relating to BATHS AND WASHHOUSES, BURIAL GROUNDS and Public LIBRARIES, MUSEUMS AND GYMNASIUMS, which otherwise are administered by distinct bodies elected by, but not necessarily from, the vestries.

They may also acquire lands for their purposes as a sanitary authority (1891, c. 76; 1893, c. 47). Under the Building Act, 1894, they have a qualified *locus standi* on questions relating to the building line and as to any by-laws to be made under that Act.

They are the authority for the control of hoardings erected in or near their streets, and for licensing stations for advertisements (1817, c. xxix. s. 71; 1855, c. 120, s. 122; 1890, c. cc. s. 32).

They have power to make local improvements with the assent of the County Council (1855, c. 120, s. 72).

With respect to open spaces they have the following powers:—

(1) To collect rates for maintenance of enclosed gardens in squares vested

in any body for the use of the inhabitants of the square, etc. (1855, c. 120, s. 239);

(2) To acquire land for open spaces and pleasure grounds (1856, c. 112, s. 11; 1877, c. 35; 1887, c. 32), and to manage and regulate the lands acquired for public recreation.

In many districts there are further powers under a multiplicity of local Acts, which are unclassified and inaccessible and whose details are unknown except to the clerks of the authorities. Power was given in 1855 (c. 120, s. 248) to get rid of or vary some of these Acts by Order in Council, but it does not appear to have been exercised. The County Council has a similar power under sec. 57 of the Local Government Act, 1888 (see *R.* v. *London County Council*, [1893] 2 Q. B. 454).

The local authorities have power to acquire land compulsorily (1) for street improvements (1817, c. xxix. ss. 80–96); and (2) with assent of a Secretary of State, for the purposes of the Management Acts (1855, c. 120, ss. 150–156), and by agreement under the Public Health Acts, 1891 and 1893.

Finance.—The expenses of each district are defrayed by rates made and levied by the administrative authority, and raised by the overseers where the authority are not overseers.

The accounts of vestries, etc., are subject to audit by the elective auditors, but not by the Local Government Board (1855, c. 120, ss. 192–197). In this respect they are like borough councils (1855, c. 120, ss. 192, 194–197; 1862, c. 102, s. 38), but they must make annual reports and returns to the Local Government Board (1855, c. 120, s. 198). See LOCAL TAXATION RETURNS.

The expenses are classified as general, lighting, etc., sewers, and highways, but are usually included in a single demand note (1855, c. 120, ss. 92, 96, 161–165; 1875, c. 33).

The authorities can borrow for their purposes directly by mortgage or from the PUBLIC WORKS LOANS FUND or from the County Council. The powers depend on the Acts of 1855 and 1862, as extended by the Public Health Acts of 1891, c. 76, and 1893, c. 47; and as to County Council loans, on the annual Money Acts of that body.

IV. EDUCATION.

(*a*) *Elementary.*—For the purposes of elementary education, the administrative county of London forms a unit, for which one School Board is elected, consisting of fifty-five members, elected from the parliamentary boroughs as constituted before the Redistribution of Seats Act, 1885. The electors are still the ratepayers, and not the parochial, parliamentary, or local government electors. The election is conducted by ballot; but the electors have a cumulative vote, *i.e.* the right to give all their votes to a single candidate, instead of one vote only for each of the number of members to be elected for the constituency (1870, c. 75, ss. 37, 38). The expenses of the School Board are collected by precepts directed to the local administrative authority (1870, c. 75, ss. 37 (11), 54, 94, Sched. 1).

(*b*) *Secondary and Technical.*—Under the Technical Instruction Act, 1889 (c. 76), the County Council is the authority to pass schemes for technical instruction, and to expend money thereon, and it receives for this purpose the LOCAL TAXATION GRANT from the proceeds of customs and excise, but is not bound to apply it for technical instruction, and thus far has applied only a small portion (1891, c. 4). It has, however, formed a Technical Instruction Board, and has passed elaborate schemes for carrying out the Act with a portion of the moneys.

V. Police.

The control and management of the police in the administrative county is in the city in the hands of the Common Council, elsewhere in that of the chief commissioner of metropolitan police, who has the conduct of street traffic in his district, and of the licensing of hackney carriages and stage carriages in his own district and the city of London. See Metropolitan Police District. The suppression of brothels is, however, dealt with by the overseers acting under the vestries. See Brothel, vol. ii. p. 272. Compensation for damage by riot, which falls on the police rate, is dealt with by the Common Council in the city; by the Receiver of Police in the rest of the administrative county (49 & 50 Vict. c. 38, Sched. 1).

VI. Poor Law.

(*a*) *Local Administration.*—The area of London for the purposes of poor law administration is that of the administrative county, with the exception of the Hamlet of Penge, which is in the Croydon Union. For local administration it is subdivided in the manner indicated in the table on the next page. The guardians are elected annually by the same electors as the vestries under the Local Government Act, 1894 (56 & 57 Vict. c. 73, ss. 20, 30, 44). The functions of the poor law authorities are in the main the same as in the rest of England. See Poor Law. But a common poor fund was created in 1867 (c. 6, ss. 61–72), which is fed by contributions from each poor law area in accordance with its valuation under the Metropolis Valuation Acts, which are assessed and collected from the poor law authority under a precept from the Local Government Board, and paid to an account at the Bank of England, and paid over by the receiver to each poor law authority to recoup the expense incurred by them, as fixed by and at or in respect of the following matters:—

(1) Maintenance of indoor poor (1870, c. 18).

(2) Maintenance of pauper children in district, separate, certificated, and licensed schools, and of orphan or deserted children boarded out (1869, c. 33, s. 21); and payment of the school fees of pauper children at public elementary schools (1875, c. 79, s. 40).

(3) Relief of destitute persons, and places for their reception, under the Houseless Poor Acts (1864, c. 116; 1865, c. 34).

(4) Maintenance of the insane in hospitals, etc., where not chargeable on the county rate.

(5) Maintenance of patients in public hospitals suffering from infectious disease.

(6) Medicine and medical and surgical appliances supplied to poor in receipt of relief.

(7) Salaries of officers employed by the district school managers or the metropolitan asylum managers, and in dispensaries, where the appointments have been approved by the Local Government Board.

(8) Fees for registration of births and deaths, and for vaccination.

(9) Compensation to officers affected or deprived of office by the Act of 1867 (see s. 69 (4); 1869, c. 33, s. 18).

The annexed table shows the poor law authorities for London, and the authorities or persons collecting the poor rate, or rates levied as part thereof, under precepts:—

Poor Law Unions or Authorities.	Bodies who Collect the Poor Rate, and the Amount of Precepts for County Rate, School Board Rate.
Guardians of Bethnal Green Parish	Overseers of Bethnal Green.
Guardians of Camberwell	Overseers of Camberwell.
Guardians of Chelsea	Guardians of Chelsea.
Guardians of Hampstead	Vestry of Hampstead.
Guardians of Islington	Vestry of Islington.
Guardians of Kensington	Vestry of Kensington.
Guardians of Lambeth	Overseers of Lambeth.
Guardians of Mile End Old Town	Overseers of Mile End.
Guardians of Paddington	Vestry of Paddington.
Guardians of Penge	Overseers of Penge.
Guardians of St. George-in-the-East	Trustees of St. George-in-the-East.
Guardians of St. Giles and St. George	Vestry of St. Giles and St. George.
Guardians of St. Marylebone	Vestry of St. Marylebone.
Guardians of St. Pancras	Directors of the Poor of St. Pancras.
Guardians of Shoreditch	Vestry of Shoreditch.
Guardians of Fulham Union	Overseers of Fulham. Overseers of Hammersmith.
Guardians of the Greenwich Union	Overseers of Deptford St. Nicholas. Overseers of Deptford St. Paul. Overseers of Greenwich.
Guardians of the Hackney Union	Trustees of Hackney. Overseers of Stoke Newington.
Guardians of the Lewisham Union	Overseers of Eltham. Overseers of Lee. Guardians of Lewisham.
Guardians of Poplar Union	Guardians of Bow. Trustees of Poplar. Overseers of Bromley.
Guardians of St. George's Union	Vestry of St. George's. Vestry of St. Margaret and St. John, Westminster. Overseers of St. Peter (Westminster Abbey).
Guardians of St. Olave's Union	Governors and Directors of the Poor of Bermondsey. Governors and Directors of the Poor of Horselydown. Overseers of Rotherhithe. Overseers of St. Olave. Overseers of St. Thomas.
Guardians of St. Saviour's	Overseers of Christchurch. Governors and Guardians of Newington. Overseers of St. George the Martyr. Overseers of St. Saviour's.
Guardians of Stepney Union	Overseers of Limehouse. Churchwardens, Overseers, and Trustees of Ratcliff (Hamlet). Overseers of Shadwell. Overseers of Wapping.
Guardians of Strand Union	Overseers of Liberty of the Rolls. Overseers of St. Clement Danes. Overseers of St. Martin-in-the-Fields. Overseers of St. Mary-le-Strand. Overseers of St. Paul, Covent Garden. Overseers of Precinct of the Savoy.
Guardians of Wandsworth and Clapham Union	Overseers of Battersea. Overseers of Clapham. Overseers of Putney. Overseers of Streatham. Overseers of Tooting Graveney. Overseers of Wandsworth.
Guardians of Westminster Union	Overseers of St. Anne. Vestry of St. James.
Guardians of Whitechapel Union	Overseers of Aldgate.

Poor Law Unions or Authorities.	Bodies who Collect the Poor Rate, and the Amount of Precepts for County Rate, School Board Rate.
Guardians of Whitechapel Union—*contd.*	Overseers of Christchurch.
	Overseers of Mile End New Town.
	Overseers of Minories.
	Overseers and Trustees of Norton Folgate.
	Overseers of Old Artillery Ground.
	Overseers of Old Tower.
	Overseers of St. Katherine.
	Trustees of Whitechapel.
Guardians of Woolwich Union . . .	Overseers of Charlton.
	Overseers of Kidbrook.
	Overseers of Plumstead.
	Local Board of Woolwich.
The Treasurer and the Overseers of Gray's Inn	The Steward of Gray's Inn.
The Treasurer and the Overseers of Lincoln's Inn	The Treasurer of Lincoln's Inn. (As to these areas, see 1875, c. 61, s. 43.)
Guardians of Holborn Union . . .	Guardians of Clerkenwell.
	Overseers of the Charterhouse.
	Overseers of Saffron Hill.
	Governors and Directors of St. Andrew and St. George.
	Vestry of St. Luke.
	Overseers of St. Sepulchre.
	[The owners of Staple Inn pay all rates.]
	[The owner of Furnival's Inn pays all rates.]
Guardians of the City of London Union .	Overseers of the several Parishes in the City of London.
The Treasurer and the Overseers of the Inner Temple	[No rates are levied in the Inner Temple, being all paid by the Society.]
The Treasurer and the Overseers of the Middle Temple	[No rates are levied in the Middle Temple, being all paid by the Society.] (As to these areas, see 1875, c. 61, s. 43.)

(*b*) *Central Authority.*—A district named the Metropolitan Asylums District was formed in 1867 (30 Vict. c. 6) for the creation and management for London of asylums for the reception and relief of the sick, insane, or infirm, or other classes of poor chargeable on London parishes or unions (30 & 31 Vict. c. 6, ss. 5–36). This statutory authority, which did not legalise the erection of an asylum where it would be a nuisance (*Met. Asylum Managers* v. *Hill*, 1881, 5 App. Cas. 582), was extended to the provision of ships, huts, and temporary erections, or hospitals (1870, c. 15), and tending places, ambulances, etc., for persons suffering from infectious disease.

The managers are elected by the poor law authorities which contribute to the expense of maintenance.

Local sanitary authorities can build hospitals for infectious patients; but as non-pauper patients are now received by the asylum managers, this power is not now much, if at all, used (1891, c. 76, ss. 75–78, 80, 81, 141).

In the event of epidemics both the managers and the County Council can act on default of a sanitary authority. The expenses fall on the common poor fund (54 & 55 Vict. c. 76, s. 104).

The powers of the managers are exercised mainly as to infectious disease, but extend to asylums for imbeciles and training ships for pauper boys.

VII. Valuation and Rating.

Property in London is assessed for purposes of imperial and local taxation under the Metropolis Valuation Acts, 1869. The valuation, which is quinquennial, subject to a power of making supplementary lists

as needed, is effected by the assessment committees for each district, subject to the attendance and suggestions of the inspectors and surveyors of taxes.

The assessment first made may be reviewed by the committee on appeal; or if they refuse to alter it, either by justices in special sessions or by the London County Sessions. Appeal lies to special sessions only when an individual assessment is complained of by a person actually aggrieved. Appeal lies to the general sessions (1) by any ratepayer and any surveyor of taxes and any overseer, with the consent of his parish, against decisions of the assessment committee on an objection to which he was a party, or against decisions of special sessions (1869, c. 67, s. 32). (2) By assessment committees, overseers, with consent of their parishes, ratepayers or rating authorities aggrieved (*a*) by the gross or rateable value of a parish being too high or too low; (*b*) by there being no approved valuation list for the parish. The utility of the power of appeal against totals has been reduced by the decision of the House of Lords in *London County Council* v. *St. George's Union*, [1894] App. Cas. 660).

The procedure on the appeals is regulated by the Act of 1869 and rules made by the general sessions under the Act printed in Hunt, *London Local Government*, vol. ii. p. 1148. The decisions therein are reported by Ryde, *Rating Appeals*. The rules for valuation are the same as in the rest of England, subject to the scheduled scale of deductions.

The assessments when completed are made up into a valuation list, which, when signed and approved, forms the basis of all rates and taxes for five years, unless altered by supplemental list.

The rates leviable in London (outside the city) are:—

(1) The county rate (1855, c. 120, ss. 171–179).

(2) The poor rate proper.

(3) The police rate (see METROPOLITAN POLICE DISTRICT).

(4) The School Board rates.

(5) The local rates (1855, c. 120, ss. 158–169).

(6) The baths and washhouses and public libraries rates levied with the poor rate.

The collecting authority is specified in the second column on p. 32. The rating authority is, in the case of local rates, the vestry or district board; in other cases the overseers acting on precepts from the spending authority. In certain cases the vestries are overseers.

Under the Equalisation of Rates Act, 1894, an equalisation fund is formed annually for all the administrative county of an amount equal to 6d. in the £ on the existing valuation lists, and is fed by a contribution from each parish of 3d. in the £ on its annual value as shown in the list.

Out of the fund each parish is credited with a grant based on its population. If the grant exceeds the contribution, the difference in favour of a parish is paid over to the sanitary authority for the parish for application for sanitary purposes, lighting of streets, in reduction of parish payments on that account. If the contribution exceeds the grant, the deficit due to the fund is collected by an equalisation charge on the parish added as a separate item to the county rate (1894, c. 53). The scheme of this Act corresponds to that of the common poor fund (see p. 31).

[*Authorities.*—Chitty's *Statutes*, 5th ed., tit. "Metropolis"; Hunt, *London Local Government*, 1897; Glen, *London Building Acts*; Macmorran, *Public Health London Act*; Parl. Pap. 1894, C. 7493; Archibald, *Metropolitan Police Guides.*]

London Gazette.—See GAZETTES.

Long.—To give a prescriptive right at common law, possession must be "long, continual, and peaceable" (*Co. Litt.* 113 *b*). "As to 'long,' Lord Coke says: 'It is the time given by law, which in England is the time whereof there is no memory of man to the contrary' . . . viz. the time of Richard I. A.D. 1189" (per Lord Blackburn in *Dalton* v. *Angus*, 1881, 6 App. Cas. 810, 811).

Long Term.—See TERMS.

Long Vacation.—See VACATION.

Lord.—Selden (*Titles of Honour*, p. 36), speaking of *Dominus*, says: "It is to be thought of only as a distinguishing attribute of greatness, and as our English word lord is; and that without any relation of it to an interest of property, or to servitude, and only as it denotes such superiours as king, or subjects of the greater nobility, with us." By the greater nobility is here meant all the peers who are either hereditary, and as such lords of Parliament, or those who may be lords of Parliament without being hereditary. (See PARLIAMENT.) Thus the whole body assembled in Parliament is called the "House of Lords" (*q.v.*) It is not a title of honour in itself, but an appellation of some particular holders of titles of honour (*q.v.*), or dignities.

But custom or courtesy extends it to the sons of certain peers. All the sons of dukes and marquises bear the courtesy title of lord, either prefixed to a dignity of the father, as in the case of the eldest son of a duke and marquis, or to their family name, as in the case of a duke's and marquis's other sons. The eldest son of an earl also bears the courtesy title prefixed to a title of the father; but the custom does not extend further. (See LADY.)

As an honorary title it is bestowed on certain official persons in respect of their office. Thus the mayors of cities such as London and York, etc.; Lord Chancellor, Lords of the Treasury, or the judges of the High Court, etc.

For the use of lord and lordship in other connections, see such articles as BISHOP; CHANCELLOR; LORD CHIEF JUSTICE; MANOR.

[*Authorities.*—Selden, *supra*; Burke *Peerage, etc.*; Dod, *Peerage.*]

Lord Chamberlain.—See CHAMBERLAIN, LORD.

Lord Chancellor.—See CHANCELLOR.

Lord Chief Justice of England.—The popular title, "Lord Chief Justice of England," did not receive full recognition at law till the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 5 (which came into operation on November 1, 1875), applied it to the Lord Chief

Justice, for the time being, of the Court of Queen's Bench. Theretofore the more correct style had been Lord Chief Justice of the King's (or, as the case might be, Queen's) Bench. Thus Shakespeare, ever accurate in his legal terminology, styles Gascoigne, C.J., "Lord Chief Justice of the King's Bench" in the *dramatis personæ* of King Henry IV. (Part 2). It was one of the specific charges levelled against Coke, C.J., which led to his dismissal in 1616, that he styled himself in the title-page to *The Reports*, Lord Chief Justice of England, instead of merely of the King's Bench. It is submitted that the Judicature Acts created no new office (see J. A. 1873, s. 5), but rather enhanced the importance of the office which had existed without material alteration since the thirteenth century (see QUEEN'S BENCH DIVISION; SUPREME COURT). From the time of Robert de Brus, appointed in 1268, successive Chief Justices of the King's Bench were styled on their appointment *Capitalis Justiciarius ad placita coram Rege tenenda* (Chief Justice to hold pleas before the King), and were so addressed in Royal Commissions and other formal documents. Thus, Cockburn, C.J., was constituted by the Queen's Writ, dated June 24, 1859, "Our Chief Justice to hold pleas before us" (Patent Roll, 23 Vict. Pt. i. No. 8); whereas Lord Coleridge and Lord Russell of Killowen, C.JJ., were appointed by patent to the office of Lord Chief Justice of England (*London Gazette*, December 3, 1880, and July 3, 1894).

The Lord Chief Justice of the King's Bench took precedence (independently of any higher precedence he might have as a Privy Councillor or a Peer) next after the Chancellor of the Duchy of Lancaster, and immediately before the Master of the Rolls (see PRECEDENCE). By the Judicature Act, 1875 (38 & 39 Vict. c. 77), it is provided (s. 4) that the Lord Chief Justice of England shall be an *ex officio* judge of the Court of Appeal, and (s. 6) that the *ex officio* judges shall rank in the order of their respective official precedence. By the Judicature Act, 1873 (s. 5), the Lord Chief Justice of England is president of the High Court in the absence of the Lord Chancellor. By R. S. C. 1883 (Order 2, r. 8), writs shall be tested, if the office of Lord Chancellor is vacant [but *semble* not if it is in commission; as to which, see Judicature Act, 1873, s. 98], in the name of the Lord Chief Justice of England. Writs on the Crown side of the Queen's Bench Division are always tested in the name of the Lord Chief Justice of England (C. O. R. 1886, r. 281). By sec. 31, subsec. (2) the Lord Chief Justice of England is president of the Queen's Bench Division, with which Division under the provisions of sec. 32 and Order in Council dated December 16, 1880 (St. R. & O., Revised, vii. 1), the Common Pleas and Exchequer Divisions are united and consolidated, the offices of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer being abolished. The Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 25, confers on the Lord Chief Justice of England all statutory powers of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron.

A Lord Chief Justice is a lord by virtue of his office, and is entitled to be addressed as "my lord" both in and out of Court. On the bench he is customarily referred to as "my lord" by his puisnes. The title "lord" is often prefixed by ancient usage to the surnames of former Chief Justices, although not peers of the realm, *e.g.* Lord Coke, Lord Hale, Lord Holt, Lord Lee are designations constantly found in the books, and commonly used at the bar.

The Lord Chief Justice is now the only judicial functionary entitled to wear on State occasions the collar of SS., a privilege shared by the Lord Chief Justice of the Common Pleas and the Lord Chief Baron till the dis-

continuance of those offices. The existing collar was provided by Cockburn, C.J., on his appointment in 1859, and is held by his successors as an office-loom. Some interesting particulars of the various collars will be found in Foss's *Judges of England*, vol. vii.

Lord High Admiral.—See ADMIRAL.

Lord High Steward (*Senescallus Angliæ*).—This is the first in rank of the feudal offices of State. It soon became hereditary in the Earls of Leicester, and its most important duties passed to the Justiciar. It was forfeited with the other honours of Simon de Montfort, regranted to the House of Lancaster, and merged in the Crown on Henry IV.'s accession to the throne. It is now only granted *pro hac vice* for the particular occasion.

1. At Coronations.—The Lord High Steward carries the crown in the coronation procession. It was also formerly the custom, now disused, to appoint him to preside in the Court of Claims as to the feudal services owing on that occasion.

2. The trial of peers for treason or felony when Parliament is not sitting takes place in the Court of the Lord High Steward. This Court is constituted for the occasion by a commission, in the nature of a commission of *oyer* and *terminer*, reciting the indictment and appointing a peer high steward to proceed upon it, and requiring the peers to be attendant on him, and the gaoler to bring the prisoner before him. He presides in Court, and is judge of all points of law and practice; the lords' triers who are summoned by his precept are merely judges of fact (Fost. *Cr. Law*, 143). The Treason Act, 1695, requires him to summon all the peers who have a right to sit and vote in trials for treason, but apparently there is no such rule at common law as to felony. The triers answer one by one on their honour; the Steward does not vote.

The early history of this Court is obscure. The first recorded trial was in 1400, and seems to have been regarded as of doubtful legality (see Pike, *History of the House of Lords*, p. 219). There has been no such trial since the Revolution (see further, 2 Hawk., P. C. c. 44).

When Parliament is sitting, trials of peers for treason and felony and impeachments (*q.v.*) take place before the Court of the Queen in Parliament. All the peers are summoned, and decide alike on questions of law and fact. It is usual, but not necessary, to appoint a Steward when peers are charged with treason or felony, but not when they are impeached for misdemeanour. It is the function of the Steward, who is addressed as Your Grace, to preside at the trial, and to advise the House on questions of law. If he votes, it can only be as an ordinary peer and from his usual place in the House. The last trial of a peer in Parliament was Lord Cardigan's (1841, 4 St. Tri. N. S. 601).

Lord Keeper—Keeper of the Great Seal.—The Chancellor of the King, now called Lord High Chancellor, is the officer who usually holds the GREAT SEAL of England, but before the year 1760 it was sometimes delivered to a Lord Keeper instead of to a CHANCELLOR. Since that date, however, there has been no Lord Keeper. There was little or no difference in dignity or duties between the two offices. By

5 Eliz. c. 18, in 1563, their identity was declared in rank, power, and privileges.

[*Authority.*—Foss, *Biog. Dict. of the Judges of England*, p. 9.]

Lord Lieutenant.—Lords lieutenant of counties were first appointed about the reign of Henry VIII. as standing representatives of the Crown to keep the counties in military order. They succeeded to the powers and duties of the sheriffs (*q.v.*) and justices of the peace, as well as to those of the special commissioners of array in regard to calling into arms and mustering the population of each county, according to the obligations then existing of performing military service, and providing horses and arms. Through all the changes which occurred in the constitution of the militia down to the year 1871, when the Army Regulation Act was passed (34 & 35 Vict. c. 86), it was under the command of the Lord Lieutenant, he was responsible for its efficiency and discipline, and the appointment and displacement of its officers devolved upon him, with only the power of veto in the Crown should he appoint improper persons. By that Act, too, which carried out the scheme for combining the regular and auxiliary forces into an organisation in connection with different territorial districts, the command of other branches of the auxiliary forces, that is the yeomanry and volunteers, which to a certain extent had been vested in the lords lieutenant, with other powers, were revested in the Crown, and declared to be exercisable through a Secretary of State, or any officers to whom Her Majesty, with the advice of a Secretary of State, might delegate such command and powers. The right of appointing deputy-lieutenants (*q.v.*), and also their jurisdiction and powers in relation to the raising of the militia by ballot, and the provisions incidental thereto when, under the Militia Acts, that course is adopted for recruiting the militia (*q.v.*), were reserved to the lords lieutenant; and by the Militia Act, 1882 (45 & 46 Vict. c. 49, s. 6 and Sched. 3), first appointments to the lowest rank of militia officers are given to persons on their recommendation.

The effect, therefore, of these enactments is almost wholly to abolish the lord lieutenancy as a great military office.

But they have left unaffected those other powers for the maintenance of civil order, and the preservation of the peace, which were conferred by the Statute of 3 & 4 Edw. VI. c. 5, and which made of the lords lieutenant officers possessing equal powers with the sheriffs for that purpose; so far as they have not been rendered obsolete by modern legislation.

Lords lieutenant are now appointed by Her Majesty under sec. 29 of the Militia Act, 1882, and by sec. 36, except as otherwise provided by that Act or any other Act, he and deputy-lieutenants are to have such jurisdiction, duties, powers, and privileges as are vested in the lieutenant and deputy-lieutenants respectively, for each county under any Act for the time being in force.

The lieutenant may appoint a deputy-lieutenant to act for him as vice-lieutenant during his absence from the county, sickness, or other inability to act (see DEPUTY-LIEUTENANT).

The Lord Lieutenant is usually also the Custos Rotulorum (*q.v.*) of the county; but the appointment and duties are distinct; the appointment of the former being essentially statutory under the Militia Act, 1882, and by patent; the latter under the sign manual.

It is usually, though not necessarily, on the recommendation of the

Lord Lieutenant that the appointments of the county magistrates are made.

In each of the ridings of the county of York a separate lord lieutenant is commissioned. The city of London has a Commission of Lieutenancy as a county in itself, and the Commissioners of Lieutenancy, by sec. 50 of the Militia Act, 1882, are for the purposes of the Act to be the lieutenant of the county. By virtue of his office the Lord Mayor is the head of the city lieutenancy, and has the privilege of recommending to the sovereign the names of persons to fill vacancies occurring therein, and his presence, or that of an alderman, is required to form a Court.

By sec. 91 of the Local Government Act, 1888, the Acts relating to the militia are applied to the whole of the administrative county of London, and it is provided that Her Majesty shall accordingly from time to time appoint a lieutenant thereof.

Although the counties of cities and counties of towns are not under the jurisdiction of the officers of the county in which they are situate, yet, for the purpose of the Militia Acts, it is provided by sec. 48 of the Militia Act, 1882, that the ridings of the county of York, and such counties of cities and towns, shall be deemed to form part of the counties to which they belong, and be subject to the jurisdiction and authority of the lieutenant, deputy-lieutenants, and other officers of the said counties. Where alteration of areas is made under the Local Government Act, 1888, by orders or schemes, it is provided by sec. 59 that such orders may deal with the powers (*inter alia*) of lieutenants and custodes rotulorum in such way as may be necessary for carrying out the purposes of the order or scheme.

[*Authorities.*—Anson, *Constitution*, Part II.; Clode, *Military Forces of the Crown*, vol. i.; Hallam, *Constitutional History*, ch. ix.; Royal Commission, 1893, City of London; *Manual of Military Law*, War Office, 1894.]

Lord Marshal.—See EARL MARSHAL; HERALDRY.

Lord Mayor.—See LONDON CITY, *ante*, p. 12.

Lord Mayor's Court.—See LONDON CITY.

Lord of a Manor.—See COPYHOLD; MANOR.

Lord Privy Seal.—The holder of the office of Lord Privy Seal is a member of the Government, usually with a seat in the Cabinet. It is an office without salary, and is sometimes held in conjunction with another office in the Ministry, no definite functions being now attached to it. A peer above the rank of Baron is usually appointed; but commoners have sometimes been appointed. He was the Keeper of the Privy Seal, which used formerly to be issued as an authority to the Lord Chancellor to affix the Great Seal to such grants, charters, etc., as required to pass the Great Seal; especially letters patent. The authority of the Privy Seal was also formerly required on the issue of money from the Exchequer; but the practice is now altered, the royal order being countersigned by two Lords of

the Treasury. The practice as to letters patent for inventions was altered by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), under which inventions are simply sealed with the seal of the Patent Office. In regard to other instruments requiring to pass the Great Seal, and which needed the authority of the Privy Seal to the Lord Chancellor, it was enacted by the Great Seal Act, 1884 (47 & 48 Vict. c. 30, s. 3), that a warrant under the sign manual, countersigned by the Lord Chancellor, or a Secretary of State, or the Lord High Treasurer, or two of the Treasury Commissioners, should be a sufficient authority for passing any instrument under the Great Seal; and that, for the future, no instrument need be passed under the Privy Seal.

See GREAT SEAL; CHANCELLOR; LETTERS PATENT.

[*Authorities.*—St. Bl., 11th ed., vol. i. pp. 592, 593; Anson, *Law and Custom of the Constitution*, 2nd ed., pt. ii. pp. 159, 160.]

Lord's Day.—See SUNDAY OBSERVANCE.

Lords, House of.—See APPEALS; HOUSE OF LORDS.

Lords Justices.—See APPEALS; SUPREME COURT; LUNACY.

Lords of Appeal in Ordinary.—See APPEALS; HOUSE OF LORDS; PEERAGE; SUPREME COURT.

Lords of Marches.—See COURT OF MARCHES.

Lords of Parliament.—See HOUSE OF COMMONS; HOUSE OF LORDS; PARLIAMENT.

Lords, Spiritual and Temporal.—See ESTATES OF THE REALM; HOUSE OF COMMONS; HOUSE OF LORDS; PARLIAMENT.

Lord Steward.—The Lord Steward's Department of Her Majesty's household is under the management of the BOARD OF GREEN CLOTH, of which the Lord Steward is the chief officer; the others being the Treasurer, Comptroller, and Master of the Household, all of whom are political officers changing places on a change of Government. The particular affairs of the household with which his department is concerned continue to be much as they were described by Coke, 4 *Inst.* 131, allowance being made for modern changes—(1) taking the account for all expenses of the said household; (2) making provision for it; (3) making payments for the same; (4) the good government of the sovereign's servants. He adds that the Board of Green Cloth never held plea of anything. The Lord Steward was also the chief judge of the ancient Court of the Marshalsea (*q.v.*), having precedency of the marshal; but this Court was abolished in 1849 by 12 & 13 Vict. c. 101, s. 13.

Lord Warden.—See CINQUE PORTS.

Loss.—The "loss" in sec. 1 of the Carriers Act (11 Geo. IV. and 1 Will. IV. c. 68) against which a carrier is protected is a loss by the carrier of the articles committed to him, or injury to them whilst in his care, and not a loss sustained by the owner in consequence of the non-delivery of the articles in due time or altogether, or the loss of the use of the article by him (*Hearn* v. *London and South-Western Rwy. Co.*, 1855, 10 Ex. 793); it includes temporary as well as permanent loss (*Millen* v. *Brash*, 1881, 51 L. J. Q. B. 166).

"It has been held that in construing a bottomry bond, 'loss' means a loss by going to the bottom of the sea" (per Martin, B., in *Broomfield* v. *Southern Insurance Co.*, 1870, L. R. 5 Ex. 196).

Where a steamship company issued a passenger ticket containing the following condition: "The company will not be responsible . . . for any loss or damage arising from the perils of the sea," it was held that the words "loss or damage arising from the perils of the sea" exempted the company from liability for injury to, or loss of life of, a passenger, occasioned on the voyage by the negligence of their servants (*Haigh* v. *Royal Mail Steam Packet Co.*, 1883, 52 L. J. Q. B. 640). See Stroud, *Jud. Dict.*

Lost Bill of Exchange.—See BILLS OF EXCHANGE, vol. ii. p. 106.

Lost Document.—If a document is shown to have been destroyed or lost, secondary evidence may be given of its contents. As to secondary evidence, see EVIDENCE.

Lost or not Lost.—Where it is desired to effect a marine insurance upon ships or goods at sea or abroad, it is usual, as a precaution, to insert in the policy the words "lost or not lost." These words give the policy a retrospective effect, and make it "a contract of indemnity against all past losses as well as all future losses sustained by the assured in respect of the interest insured" (Parke, B., *Sutherland* v. *Pratt*, 1843, 11 Mee. & W. 296, 311). This, however, is subject to two conditions, namely, that any past loss is not a total one, for in that case there would be nothing for the policy to attach to (*ibid.*, *Hastie* v. *Couturier*, 1853, 9 Ex. Rep. 109), and that the assured does not know of any loss, at the time of making the policy, of which the underwriter is ignorant. But if the underwriter knows of a previous loss when he subscribes the policy, the policy is good against him (*Mead* v. *Davison*, 1835, 3 Ad. & E. 303, 308); and it is equally so where both assured and underwriter know of a previous loss when the policy is effected, *e.g.* where a proposal to insure was accepted and the premium paid in February, and the policy was not made till October, and in the interval an average loss had taken place (*Mead* v. *Davison*, above); and where a policy of reinsurance (succeeding another) was effected after a loss to ship and goods by fire became known to both parties, neither previously knowing that there was an excess of insurance on board (which would, by the course of business between them, be covered by reinsurance),

and on receipt of advices after making the policy the assured appropriated that excess to that policy, he was allowed to recover (*Gledstanes* v. *Roy.* *Ex. A. C.*, 1864, 34 L. J. Q. B. 30). Under a policy containing these words it is no defence for the underwriter to object that the assured did not acquire an insurable interest in the subject of insurance till after the loss, for the policy relates back to the beginning of the risk (*Sutherland* v. *Pratt*, above). Time policies (equally with voyage policies) may be made retrospective by using these words, and antedating the beginning of the risk (*Hucks* v. *Thornton*, 1815, Holt, 30; 17 R. R. 594). The effect of the words may be neutralised or limited by the rest of the policy, *e.g.* where goods were insured "lost or not lost, warranted well December 9, 1784," the warranty was held to be satisfied by the ship having been safe for any part of that day; and as she was lost at 8 a.m. that day, though the policy was subscribed between 1 and 3 p.m. of the same day, the underwriter was held liable (*Blackhurst* v. *Cockell*, 1791, 3 T. R. 360; 1 R. R. 717).

The phrase is also found in through bills of lading, *e.g.* "freight to be considered earned, ship lost or not lost, at any stage of the entire transit," and if freight for the whole transit be prepaid, it is irrecoverable (*Greeves* v. *West India Co.*, 1870, 22 L. T. 615).

Lot — A proportion of rates and taxes; a contribution. See SCOT AND LOT.

Lot Meads—Common meadow or pasture lands divided yearly among the owners by lot; the share of each person being called a dole (*q.v.*) or lot. The owner of a lot may have a freehold in the soil (*Co. Litt.* 4 *a*); or he may only have *vesturam terræ* (*Tenants of Owning and Northmaston's* case, 1587, 4 Leon. 43). See COMMON; LAMMAS LANDS.

[*Authorities.*—Williams, *Rights of Common*, 79; Elton, *Commons and Waste Lands*, 31; Elphinstone, *Interpretation of Deeds*, Glossary, *s.v.* "Dole."]

Lotteries.—Until 1823 (4 Geo. IV. c. 60, s. 19) it had been the practice of the State at intervals to resort, as a means of obtaining public funds, to lotteries in the manner still used by public bodies in Germany and by the State in Italy; and the first statutes against lotteries were directed against them as having a mischievous effect on persons enticed to take part in them, and as interfering with State enterprises in the same direction.

The statutes still in force on the subject, most of which received short titles in 1896 (c. 14), are—

The Lotteries Act, 1699 (10 Will. III. c. 23; 10 & 11 Will. III. c. 17 in Ruffhead).
" " " 1710 (9 Anne, c. 6, s. 57).
" " " 1721 (8 Geo. I. c. 2).
" " " 1722 (9 Geo. I. c. 19).
" " " 1732 (6 Geo. II. c. 35).
The Gaming Act, 1738 (12 Geo. II. c. 28).
" " " 1739 (13 Geo. II. c. 19, s. 9).
" " " 1745 (18 Geo. II. c. 34).
" " " 1802 (42 Geo. III. c. 119).

The Lotteries Act, 1806 (46 Geo. III. c. 148, s. 59).
" " " 1823 (4 Geo. IV. c. 60).
" " " 1836 (6 & 7 Will. IV. c. 66).
" " " 1845 (8 & 9 Vict. c. 74).
The Art Unions Act, 1846 (9 & 10 Vict. c. 48).

These enactments are so closely connected with the Betting and Gaming Acts that they might have been treated under the titles GAMES and GAMING (AND WAGERING), but their provisions are much more complicated and multifarious than those relating to Betting and Gaming. Their nature and contents are very fully and accurately stated in Coldridge and Hawksford on *Gambling* (p. 319), and for practical purposes it is necessary to refer to the text of each statute or to that most generally used for prosecutions, the Act of 1802. For the purpose of this article it must suffice to indicate what a lottery is, and the classification of the numerous offences which may be committed with respect to it.

Definition.—The accepted definition of a lottery is a distribution of prizes by lot or chance (*Barclay* v. *Pearson*, [1893] 2 Ch. 154). This does not apply to settling by lot the shares of co-owners, but to distribution of a fund in shares which do not represent the contributions of the recipients (see *O'Connor* v. *Bradshaw*, 1850, 5 Ex. 882). The Act of 1699 refers to lotteries by drawing, playing, or throwing by dice lots, cards, balls, or any other numbers or figures, or in any other way whatsoever. That of 1721, to lots, tickets, numbers, or figures; that of 1738, to lots, tickets, numbers or figures, cards or dice, and games, methods, or devices depending on or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine, or device of any kind whatsoever.

The Acts of 1738, 1740, and 1745 treat as lotteries the games ace of hearts, faro, basset and hazard, passage and roulette or roly-poly, and all games played (except backgammon and tables), invented or to be invented, with dice, or with any instrument, engine, or device in the nature of dice having one or more figures or numbers thereon; and the Act of 1812 deals with little-goes, or any lottery not authorised by statute, played, drawn, or thrown for by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever.

The decisions on these various and sweeping definitions come to this: that the distribution must be determined by mere chance and not by judgment or skill, but that it need not be decided by any of the physical means above enumerated. It includes missing word competitions (*Barclay* v. *Pearson*, [1893] 2 Ch. 154), distributions on art union principles by persons other than art unions (*R.* v. *Harris*, 1866, 10 Cox C. C. 352; *Morris* v. *Blackman*, 1864, 10 Jur. N. S. 520), distributions by tradesmen of prize coupons with wares sold (*Taylor* v. *Smetten*, 1883, 11 Q. B. D. 207; *Hunt* v. *Williams*, 1888, 52 J. P. 821), and sweepstakes (*Allport* v. *Nutt*, 1845, 1 C. B. 974; *Gatty* v. *Field*, 1846, 9 Q. B. 431). But a distribution is not within the law if there is any room for the exercise of skill, even in guessing the winners in horse races (*Caminada* v. *Hulton*, 1891, 60 L. J. M. C. 116; *Stoddart* v. *Sagar*, [1895] 2 Q. B. 474), nor in the allotment of land by ballot between co-owners.

The Lottery Acts do not apply to art unions carrying on business under a royal charter, or under a constitution and rules approved by the Privy Council (1846, c. 48). It does not the least matter what the prize to be gained by the result of the lottery is. The Acts enumerate the sale of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other

things for the improvement of small sums of money (1721, c. 2; 1738, c. 28).

Offences and Remedies.

Indictment.—The Act of 1699 (c. 17) deals (s. 1) with two classes of lotteries—those under colour of a grant, patent, or licence, and those carried on without any pretence of sanction by Crown or Parliament. All such lotteries are declared to be common and public nuisances, *i.e.* indictable misdemeanours (see *R.* v. *Crawshaw*, 1860, 8 Cox C. C. 375). This declaration was repeated in 1802 (c. 119) as to little-goes; and patents, grants, and licences for lotteries are declared void and against law, which put an end to a means by which money could be obtained by the Crown without the intervention of Parliament. The only subsequent instance in which a private lottery is legalised is that of art unions, which, under the Act of 1846, are legalised if incorporated by royal charter or Board of Trade.

Building and loan societies did not fall within the lottery laws, even if they distributed loans or other advantages by ballot (*Wallingford* v. *Mutual Society*, 1880, 5 App. Cas. 685); but now this mode of distribution is forbidden as to building societies (1884, c. 47, s. 12).

The prohibition on lotteries under grant applied only to British grants, but was in 1722 extended to lotteries by virtue or colour of any grant or authority from any foreign prince, State, or Government. It is curious that in *Macnee* v. *Persian Investment Corporation*, 1890, 44 Ch. D. 306, Chitty, J., does not appear to have treated this enactment as rendering illegal a British company formed, *inter alia*, to acquire a State lottery in Persia; but the director of public prosecutions took steps which effectually prevented the utilising the concession.

An indictment seems also to lie for unlawful lotteries or games, under the Acts of 1738, 1739, and 1745.

Informations in the High Court.—The Acts also create a series of offences which entail the forfeitures therein specified, which are now recoverable by information in the High Court in the name of the Attorney-General to the use of the Crown (1806, c. 148; 1845, c. 74).

Keeping a Lottery.—Publicly or privately exercising an unlawful lottery, keeping a place for lotteries, home or foreign (1699, c. 17, s. 2; 1721, c. 2, s. 36; 1722, c. 19, s. 4; 1732, c. 35, s. 39; 1738, c. 28; 1739, c. 19, s. 9; 1802, c. 119, s. 2).

Advertising Lotteries.—It is an offence to advertise a lottery, or publish a scheme of a lottery, or a proposal to use a place for an unlawful lottery (1710, c. 6, s. 36; 1722, c. 2; 1723, c. 19, s. 4; 1802, c. 119, s. 5; 1836, c. 66). The penalty is more severe when the advertisement is by the lottery-keeper than when it is by a printer or newspaper, who are liable under the Acts (*King* v. *Smith*, 1791, 4 T. R. 414).

Selling Lottery Tickets.—It is an offence to sell foreign lottery tickets (1723, c. 19; 1732, c. 35; 1823, c. 60, s. 41).

Taking Part in Lotteries.—This is an offence under the Acts of 1699 (c. 23, s. 3), 1721 (c. 2, s. 37), 1738 (c. 28, s. 3), 1739, and 1745.

Actions by Informers.—The Acts up to 1802 apparently contemplated that informations could be laid or actions brought by common informers, and the forfeitures were divisible—one-third to the Crown, one-third to the informer, and one-third to the poor of the parish in which the offence was committed. Since 1806 the information must be in the name of the Attorney-General, and the forfeitures go to the Crown (1806, c. 148, s. 59; 1823, c. 60, s. 62; *R.* v. *Tuddenham*, 1841, 5 Jur. O. S. 871), except under

the Act of 1836, where the informer can bring an action, and receives half the penalty, £50 (1836, c. 66). But in the case of advertisements in newspapers within that Act, the Attorney-General alone can sue (1845, c. 74).

Proceedings under the Vagrancy Acts.—The ordinary procedure is the alternative proceeding allowed to be taken under the Vagrancy Acts in respect of the offences created by the Acts of 1802 and 1823 (c. 60, s. 61), viz. keeping a place for exercising a lottery, or knowingly allowing a lottery to be kept, or aiding and abetting in or employing persons in keeping a lottery, and selling tickets or publishing proposals for lotteries. The penalty is imprisonment with or without hard labour for not over three months, and fine not exceeding £25. The justices have only jurisdiction to convict the keeper or other person as a rogue and a vagabond (*Taylor* v. *Smetten*, 1883, 11 Q. B. D. 207). There are provisions for appeals in some of the earlier Acts, which appear to be superseded by the appeal sections of the Vagrancy Acts and Summary Jurisdiction Acts, 1879 and 1884. See VAGRANT.

Besides the provisions of the statutes as to assisting in the commission of offences, the general rules of law as to aiding or abetting or procuring the commission of an offence are applicable, whether the offence is punishable summarily or on indictment (*Barratt* v. *Burden*, 1893, 63 L. J. M. C. 33). The controversies which have arisen under the Betting and Gaming Acts as to the meaning of the term "place" are avoided by the very full definition for lottery purposes given in the Act of 1823 (c. 60, s. 60). All the authorities bearing on this subject are considered in the conflicting cases of *Hawke* v. *Dunn*, [1897] 1 Q. B. 579; and *Powell* v. *Kempton Park Race Course Co.*, [1897] 2 Q. B. 242; the latter now under appeal to the House of Lords. An action will not lie to recover winnings (*Allport* v. *Nutt*, 1845, 1 C. B.; *Fisher* v. *Bridges*, 1854, 3 El. & Bl. 642), but it will apparently lie to recover the stake (*Gatty* v. *Field*, 1846, 9 Q. B. 431; *In re Cronmire*, 1898, 14 T. L. R. 242; and see BETTING HOUSE; GAMES; GAMING HOUSE).

[*Authorities.*—Stutfield on *Gaming*; Coldridge and Hawksford on *Gaming.*]

Lower Canada.—See CANADA.

Low Water Mark.—See FORESHORE; HIGH AND LOW WATER MARK.

Lucid Interval.—See LUNACY.

Lucifer Match Factories.—See FACTORIES AND WORKSHOPS, vol. v. at p. 304.

Luggage.—See CARRIER; PASSENGER; RAILWAY.

Lump Freight.—See FREIGHT, vol. vi. p. 5.

Lunacy.

TABLE OF CONTENTS.

PRELIMINARY 46
Scope of Article 46
Definitions 46
Legal Tests of Lunacy . . . 47
CIVIL CAPACITY 47
Contracts 47
Marriages 49
Wills 50
CRIMINAL RESPONSIBILITY . . 51
JURISDICTION IN LUNACY . . . 54
Origin and Present Position of . 54
Modes in which exercised . . 56
I. *Inquisitions* 57
II. *Summary Proceedings* . 60
(1) *Under sec.* 116 *of the Lunacy Act*, 1890 . 60
(2) *In Small Cases* . . 60
III. *Traverse* 60
IV. *Proceedings consequential on Inquisitions* . . . 61
V. *Supersedeas* . . . 66
MISCELLANEOUS 66

PRELIMINARY.—*Scope of Article.*—The whole law of lunacy, and the law of local government, in their relations to the existing asylum system in this country have been treated in the article ASYLUMS, vol. i. pp. 368–395. The subject-matter of the present article is the jurisdiction in lunacy and the civil capacity and criminal responsibility of the insane. Some notes on the medical aspects of insanity, in so far as these are of legal importance, will be found in the article MEDICAL JURISPRUDENCE.

Definitions.—It may be desirable at the outset to notice the principal legal terms now in use with reference to persons under mental disabilities, and their respective meanings.

Non compos mentis (not master of his senses) is used sometimes, as in the Statute *De Prærogativâ Regis* (17 Edw. II. cc. 9 and 10), as indicating a species contrasted with IDIOT, sometimes as by Coke, *Beverley's* case, Jac. I. 4 Co. Rep. 124; *Co. Lit.* 247 (*a*), as a genus, including (1) the idiot; (2) a person who was of good and sound memory, and by the visitation of God, sickness, grief, or accident has lost it; (3) the lunatic *qui gaudet lucidis intervallis*; (4) the drunkard; and sometimes, chiefly in Acts of Parliament relating to the insane (cp. 23 Eliz. c. 3, s. 3; 21 Jac. I. c. 16, s. 3; 4 Geo. IV. c. 76, s. 17), either in the same generic sense, or in connection with the terms "idiot" and "lunatic," with the force of *ejusdem generis.* Hale (1 P. C. 29) adopts a classification somewhat more elaborate, including under *non compos mentis*—(1) *dementia naturalis* or *a nativitate, i.e.* idiocy or fatuity; (2) *dementia accidentalis*, or *adventitia*, subdivided into (*a*) *quoad hoc vel illud*, or (*b*) total; and again into (*c*) permanent or fixed (*i.e.* phrensy), or intermittent (*i.e.* lunacy), which last is again divisible, according to its danger and activity, into *furor, rabies, mania*, on the one hand, and deep delirium and stupor on the other; (3) *dementia affectata* or drunkenness. The scope of the term *idiot* will be apparent from the above analysis of *non compos mentis.* See also article IDIOT, and note that the term "lunatic" includes "idiot" for the purposes of the Lunacy Act, 1890 (see s. 341 of that statute); *aliter* in the Idiots Act, 1886 (as to which, see IDIOT). The term *lunatic*—which is variously derived from the Latin *luna*, in consequence of the supposed influence of the moon on mental disorders (cp. Hale, 1 P. C. 31), and from *lucidus*, with reference to the lucid intervals enjoyed by sufferers from lunacy—does not appear in the statute book till the reign of Henry VIII. (33 Hen. VIII. c. 20). Its place in the classifications of Coke and Hale has been already indicated (*vide supra*). Formerly "lunacy" necessarily indicated incapacity, while it lasted. It has now lost this precise signification, and is used in a great variety of senses and juxtapositions, sometimes as a general term (16 & 17 Vict. c. 96; 16 & 17 Vict

c. 97), sometimes in contradistinction to idiots and imbeciles (Idiots Act, 1886; see IDIOT), once at least, viz. in sec. 341 of the Lunacy Act, 1890, as including "idiot," and frequently in conjunction with the terms "unsound mind" and "insane," and it no longer necessarily imports incapacity. The term lunatic is impliedly extended by sec. 116 (1) of the Lunacy Act, 1890—as to which, see *infra*, p. 60. The term *unsound mind* is used in many statutes indiscriminately to signify *non compos mentis* and lunacy. Lord Eldon said that it imported a state contradistinguished both from idiocy and from lunacy, and yet such as to justify a commission (*In re Portsmouth*, 1815, Shelf. *Lun.* 5). It does not necessarily import incapacity.

Imbecility of mind, a weakness of mind between the limits of absolute idiocy on the one hand and of perfect capacity on the other (*Ingram* v. *Wyatt*, 1828, 1 Hag. E. R. at p. 401; see IDIOT and *infra* as to sec. 116 (1) of the Lunacy Act, 1890).

A *lucid interval* is not necessarily a complete restoration to mental vigour previously enjoyed (*Ex parte Holyland*, 1805, 11 Ves. 10; 8 R. R. 67, per Lord Eldon, L.C.), nor is it merely the cessation or suppression of the symptoms of insanity (per Sir John Dodson in *Dyce Sombre* v. *Prinsep*, 1856, 1 Deane, at p. 110).

It is the recovery of capacity for the particular transaction which is the subject of judicial investigation. It is chiefly in connection with the wills of alleged lunatics that the meaning of "lucid interval" has come before the Courts. But the above definition is believed *mutatis mutandis* to be correct.

An insane *delusion* is not merely an unfounded, though colourable, suspicion (*Chambers* v. *Queen's Proctor*, 1840, 2 Curt. at p. 448), nor even a belief which no rational person would have entertained (*Waring* v. *Waring*, 1848, 6 Moo. P. C. at p. 353); it is a persistent and incorrigible belief that things are real which exist only in the imagination of the patient (*s. c.*), and which no rational person can conceive that the patient when sane would have believed (*Mudway* v. *Croft*, 1843, 3 Curt. 671). The effect of insane delusions on civil capacity and criminal responsibility is considered *infra*, pp. 51, 52.

In addition to the above, the legal nomenclature of insanity contains other terms the definitions of which will be more conveniently noted as they occur in the course of this article, viz. *partial insanity*, *infra*, p. 53; *moral insanity*, *infra*, p. 53.

Legal Tests of Lunacy.—Three general observations on this subject must be premised—(1) The legal tests of lunacy differ from the medical; as to the latter, see MEDICAL JURISPRUDENCE, *post*. (2) In the development of most of the great heads of civil and criminal law there has been an intermediate period in which the law endeavoured to test lunacy for legal purposes by an external standard. Illustrations of this proposition will be found under the headings CIVIL CAPACITY, *Marriage* and *Wills*; and CRIMINAL RESPONSIBILITY, *infra*, pp. 49 *et seq.* (3) The modern *tendency*, however (for at least in the criminal law it has scarcely yet taken a more definite form, and there are departments, *e.g.* the law as to the committal of lunatics to asylums, in which the test is inapplicable), is to consider the question of capacity or responsibility with strict reference to the character of the act which has to be or has been done.

CIVIL CAPACITY.—*Contracts.*—The rules of law as to the contractual capacity of insane persons may be briefly summarised as follows:—(1) *Matters of record* were formerly not impeachable on the ground of insanity, for the double reason of their solemnity and of the importance

from the point of view both of the dignity of the Courts and of the administration of justice that they should not be challenged. *Semble*, in regard to such matters as statutes, recognisances, and statutory acknowledgments, the old rule would still receive considerable weight (cp. *Foxwell* v. *Van Grutten*, 1896, 12 T. L. R. at p. 309). (2) The *contract under seal* (other, it seems, than a voluntary disposition; cp. *Elliot* v. *Ince*, 1857, 7 De G., M. & G. 475) of a lunatic is, it is conceived, only voidable if it can be shown by him or on his behalf, that he was at the time of entering into it to the knowledge of the other party so insane as not to know what he was about (cp. *Price* v. *Berrington*, 1851, 3 Mac. & G. at p. 498; *Kirkwall* v. *Flight*, 1842, 3 W. R. 529; *Campbell* v. *Hooper*, 1855, 1 Jur. N. S. at p. 672; and see the cases cited in (3) *infra*). (3) The *simple contract* of a lunatic, whether executory or executed, is voidable not void, and is binding upon him unless he can show that at the time of making it he was to the knowledge of the other party so insane as not to know what he was about. The *locus classicus* on this subject is now *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, by which the older authorities of *Molton* v. *Camroux*, 1848, 2 Ex. Rep. 487; 1849, 4 Ex. Rep. 17; and *Matthews* v. *Baxter*, 1873, L. R. 8 Ex. 132 (a case of intoxication—the law as to the civil capacity of drunkards is the same as that of the civil capacity of lunatics) were extended. It follows from rule (3) that the defence of lunacy in an action of contract will fail if the defendant does not establish both of the elements above mentioned, viz. incapacity to contract and notice, affirmatively.

As to what constitutes notice, see *Niell* v. *Morley*, 1804, 9 Ves. 478; *Greenslade* v. *Dare*, 1855, 20 Beav. at p. 292. As in all other cases, the BURDEN OF PROOF may shift during the trial. UNDUE INFLUENCE is a ground of relief. The contract of a lunatic during a lucid interval (*vide supra*, p. 47) is valid (4 Co. Rep. 125 (*a*); *A.-G.* v. *Parnther*, 1792, Bro. C. C. 441). The burden of proving a lucid interval rests on the party asserting its existence. Supervening insanity will not release a person from a contract entered into while of sound mind, unless it renders performance impossible (cp. *Hall* v. *Warren*, 1804, 9 Ves. 605; 7 R. R. 306; *Owen* v. *Davies*, 1747–48, 1 Ves. 82; *Pegge* v. *Skynner*, 1784, 1 Cox, 23). A verdict on an inquisition *de lunatico inquirendo* is only presumptive evidence of incapacity (cp. *Sergeson* v. *Sealey*, 1742, 2 Atk. 412), or of capacity (cp. *Hume* v. *Burton*, 1784, 1 Ridgw. Ap. 1; *Ex parte Bradbury*, 1839, 3 Jur. 1108). The law implies on the part of a lunatic, whether so found or not (cp. *Brockwell* v. *Bullock*, 1889, 22 Q. B. D. 567), an obligation to repay out of his own property the cost of necessaries supplied to him with the intention of constituting a debt against his estate (cp. *Rhodes* v. *Rhodes*, 1890, 44 Ch. D. 94, and other cases there cited); and it is immaterial whether the party supplying the necessaries is or is not aware of the lunacy (cp. *Wentworth* v. *Tubb*, 1841, 1 Y. & C. C. 171). "Necessaries" includes food (*West Ham Union* v. *Pearson*, 1890, 54 J. P. 645), clothing, maintenance, etc., and also expenses incurred for the protection of the lunatic and his estate, *e.g.* the costs of obtaining (*Williams* v. *Wentworth*, 1842, 5 Beav. 325) or resisting (*Wentworth* v. *Tubb*, 1843, 5 Jur. 1150) a commission. See further, CONTRACT, vol. iii. at p. 342 (*Infants*), and INFANTS. "Where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor" (Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 2).

A lunatic is liable for necessaries supplied to his wife by a person who was not aware of his unsoundness of mind, and to whom he had held out his wife as agent while he was of unsound mind (*Drew* v. *Nunn*, 1879,

4 Q. B. D. 661); and this rule has been applied to money advanced to the wife and expended by her in payment of her necessary expenses (*Davidson* v. *Wood*, 1863, 2 N. R. 15). But where the wife has received money sufficient for, and applicable to, the provision of necessaries, the husband is not liable (*Richardson* v. *Du Bois*, 1869, L. R. 5 Q. B. 51; *Chappell* v. *Nunn*, 1879, 4 L. R. Ir. 316).

Marriages.—The Statute 15 Geo. II. c. 30 provided that the marriages of lunatics so found by inquisition (not superseded) should be void without any proceedings for nullity (cp. *Ex parte Turing*, 1812, 1 Ves. & Bea. 140), even although they were contracted during lucid intervals (cp. 1 Hag. Con. 417). This statute was repealed by the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91). But the Act 51 Geo. III. c. 37—the especial object of which was to extend its provisions to Ireland—is not affected by that repeal, and, as it is perfectly general in its provisions, it is conceived that the marriages of lunatics so found is still in England, as well as in Ireland, null and void, in spite of the repeal of 15 Geo. II. c. 30 by the Statute Law Revision Act, 1873.

Except, however, where this statute applies, unsoundness of mind is not now, in the absence of UNDUE INFLUENCE, a bar to the formation of a valid marriage if the party whose capacity is questioned knew at the time of the marriage the nature of the engagement into which he was entering (cp. *Durham* v. *Durham*, 1885, 10 P. D. 80; *B.* v. *A.*, 1891, 27 L. R. Ir. 587). In *Hancock* v. *Peaty*, 1867, L. R. 1 P. & D. 335, 341, Sir J. P. Wilde said (*obiter*) that if the proof showed the mind of the alleged lunatic to be diseased, the Court would not gauge the extent of the derangement. This *dictum* was inspired by the theory propounded by Lord Brougham in *Waring* v. *Waring*, 1848, 6 Moo. P. C. 341, that, as the mind is one and indivisible, any the least degree of insanity is fatal to testamentary capacity. But this external standard was rejected by the Court of Queen's Bench in *Banks* v. *Goodfellow*, 1870, L. R. 5 Q. B. 549. *Semble*, where incapacity can be proved, the question whether the sane contracting party had notice of it is immaterial to the issue of validity (cp. *Elliott* v. *Gurr*, 1812, 2 Phillim. at p. 19, and *Maynard* v. *Hill*, 1888, 105 U. S. 190). Notice is, of course, relevant as showing the existence of undue influence or fraud in cases falling short of positive incapacity; and admissions or statements by the sane spouse as to circumstances pointing to the existence of unsoundness of mind in the other contracting party at the time of the marriage, are relevant to the question whether there was such unsoundness of mind at the critical period as to invalidate the marriage. Promise of marriage stands on a different footing as regards notice from marriage itself. The defendant in an action for breach of promise of marriage, relying on unsoundness of mind at the time of the promise, must show not only that he was incapable of making the promise, but that the other contracting party was aware of the fact (cp. *Barnard* v. *Jarrard*, 1896, *Times*, Feb. 14). Even if, however, these points are not established, the defendant will be entitled to judgment if it is proved that he was incapable at the time fixed for the performance of the promise, unless he has committed the breach complained of while sane (*s. c.*). The fact that a party had, prior to making a promise of marriage, been insane and confined in an asylum is no answer to an action for a subsequent breach of the promise (*Baker* v. *Cartwright*, 1861, 30 L. J. C. P. 364). Everything is presumed in favour of a marriage regularly solemnised. The burden of proving incapacity therefore rests on the person alleging its existence (*Cannon* v. *Cannon*, 1885, 10 P. D. at p. 98). A petition for nullity of marriage on the ground of insanity may be

presented by (*a*) the sane contracting party, while the insane party is still of unsound mind or after his or her recovery (cp. *Hunter* v. *Hunter*, and *Cannon* v. *Cannon*, 1885, 10 P. D. at pp. 93 and 96); (*b*) the insane contracting party, after recovery (cp. *Turner* v. *Meyers*, 1808, 1 Hag. Con. 414); (*c*) the guardian of a minor, sane or insane, contracting party (*Parnell* v. *Parnell*, 1814, 2 Hag. Con. 171; and see *Hancock* v. *Peaty*, 1867, L. R. 1 P. & D. 336–7); (*d*) in the case of a lunatic so found, the committee (the sanction of the judge in lunacy (see *infra*, p. 54) should be obtained so as to protect the committee in any question of costs), or if no committee has been appointed, a guardian *ad litem* (see Div. Rules, 196, and *Fry* v. *Fry*, 1890, 15 P. D. 50); (*e*) after the death of the contracting party, any person having an interest in getting the marriage set aside, *e.g.* the next-of-kin on the widow's or husband's claim to administration. In *Fry* v. *Fry* (*ubi supra*), the majority of the Court of Appeal expressed the opinion though without deciding the point, that r. 196 of the Divorce Rules applied only where a person had been found lunatic by inquisition. If it is inapplicable and no committee has been appointed, a lunatic sues by his next friend (R. S. C., Order 16, r. 17), and defends by a guardian *ad litem* (*ibid.*).

Supervening insanity is no bar to proceedings by (see *Baker* v. *Baker*, 1880, 5 P. D. 142) or against (see *Mordaunt* v. *Moncrieffe*, 1874, L. R. 2 H. L. Sc. 374) a lunatic husband or wife for divorce or separation for previous alleged matrimonial offences. Supervening insanity does not avoid a marriage nor constitute *per se* a ground either for divorce or for judicial separation (*Hayward* v. *Hayward*, 1858, 1 Sw. & Tr. 84; *Hall* v. *Hall*, 1864, 3 Sw. & Tr. at p. 349). But cruelty does not cease to be a cause of suit if it proceeds from violent and disorderly affections or want of moral control falling short of positive insanity (cp. *White* v. *White*, 1859, 1 Sw. & Tr. 592); and possibly even cruelty springing from *intermittent* or *recurrent* insanity might be held a ground for a judicial separation, since in such cases the party offended against cannot protect himself or herself by securing the permanent confinement of the offending spouse (cp. *Hanbury* v. *Hanbury*, [1892] Prob. at p. 225). Whether insanity at the time an alleged matrimonial offence was committed is a bar to a suit for divorce or separation is an open question; and in any event, in order that it may be so, the insanity must be of such a character as to have prevented the insane party from knowing the nature and consequences of his act at the time when he committed it (*Hanbury* v. *Hanbury*, 1892, 8 T. L. R. at p. 560). As to the effect of insanity on other relations arising from marriage, see *infra*, MISCELLANEOUS.

Wills.—Since the repudiation by the Court of Queen's Bench in *Banks* v. *Goodfellow*, 1870, L. R. 5 Q. B. 549, of the doctrine propounded by Lord Brougham in *Waring* v. *Waring*, 1848, 6 Moo. P. C. 341, that, the mind being one and indivisible, any the least degree of insanity was fatal to testamentary capacity, the law on this subject has stood as follows: A man may make a valid will if he possesses, at the time of executing it, a memory sufficiently active to recall the nature and extent of his property and the persons who have claims upon his bounty, and a judgment and will sufficiently free from the influence of morbid ideas or external control to determine the relative strength of those claims. See, as authorities for this proposition, *Banks* v. *Goodfellow*, *supra*; *Roe* v. *Nix*, [1893] Prob. 55; *Boughton* v. *Knight*, 1873, L. R. 3 P. & D. 68; and the American cases of *Converse* v. *Converse*, 1849, 21 Vermont, p. 170; *Harrison* v. *Rowan*, 1820, 3 Wash. 585; and *Delafield* v. *Parish*, 1862, 25 N. Y. 9 (the *Banks* v. *Goodfellow* of America). As to the effect of undue influence on testamentary capacity, see the article on

that subject. The existence of insanity in a testator at the time when he made his will creates a presumption against testamentary capacity; but this presumption, even when it is fortified by confinement in an asylum (see *Cartwright* v. *Cartwright*, 1793, 1795, 1 Phillim. 90, 122) or by a verdict of unsoundness of mind under an inquisition (see *Roe* v. *Nix*, *supra*; and *Carter* v. *Dove*, 1896, cited in *Journal of Mental Science* for 1896, p. 899), may in any case be rebutted by evidence either of a lucid interval (*vide supra*) at the critical period (see *Cartwright* v. *Cartwright*, *supra*, and *Nichols* v. *Binns*, 1858, 1 Sw. & Tr. 239), or that the insanity and delusions of the testator were irrelevant to the subject-matter of his will (*Banks* v. *Goodfellow*, *supra*), or insufficient to destroy or suspend testamentary capacity, as above defined (cp. *Laing* v. *Bruce*, 1838, 1 Dunlop, 38; *Morison* v. *Maclean's Trustees*, 1862, 24 Dunlop, 625; *Ballantine* v. *Evans*, 1886, 13 Ct. of Sess. Cas. 4th Ser. 652). *A fortiori*, a delusion which tends to quicken a testator's faculties will not destroy testamentary capacity (*Jenkins* v. *Morris*, 1880, 14 Ch. D. 674, a case of contract).

The rules, above stated as to the effect of lucid intervals and delusions on wills, apply equally, *mutatis mutandis*, to contracts and marriages. See *Jenkins* v. *Morris*, *supra*, where the validity of a lease of a farm granted by a person who was at the time under an insane delusion that the farm was impregnated with sulphur was upheld.

In probate suits the *ultimate* burden of proving testamentary capacity rests on the party propounding the will. See *Cleare* v. *Cleare*, 1869, L. R. 1 P. & D. at p. 657; *Sadler* v. *Sadler*, 1857, 3 C. B. N. S. 87; the American case of *Crowningshield* v. *Crowningshield*, 1854, 2 Gray, 527; and see *Triscott* v. *Hill and Another*, 1897, *Times*, Feb. 8, 1897, as a recent instance of the principle above stated being applied. As to costs in cases involving questions of testamentary capacity, see article COSTS, vol. iii. at pp. 481, 482.

There are a number of minor points in which the effect of insanity on civil capacity comes into question. These will be found arranged, and commented on, in alphabetical order, *infra*, MISCELLANEOUS.

Moral insanity (*vide infra*, p. 53) has been held to be insufficient to invalidate a will (*Frere* v. *Peacocke*, 1846, 1 Rob. Eccl. 442, 456). But *query*, where it was sufficiently pronounced to unhinge the disposing mind.

Besides *Waring* v. *Waring* (*supra*, p. 49) there are two cases which occupy an exceptional position in the law as to the civil capacity of the insane—(1) *Dew* v. *Clark*, 1826, 2 Add. 79–209 and Add. 123 *et seq.*, in which Sir John Nicholl is supposed to have held that delusion is the true if not the sole note of insanity, and that "insanity vitiates all acts"; (2) *Smith* v. *Tebbitt*, 1867, L. R. 1 P. & D. 389, in which Sir J. P. Wilde followed *Waring* v. *Waring* as to testamentary capacity, as he did in regard to capacity to marry in *Hancock* v. *Peaty* (*supra*, p. 49).

As regards (1), note that it is doubtful whether Sir John Nicholl intended to affirm the proposition attributed to him (see *Chambers* v. *Queen's Proctor*, 1840, 2 Curt. at p. 448), and, as regards both (1) and (2), that they were merely *obiter*, and are superseded by *Banks* v. *Goodfellow* (*supra*, p. 50).

CRIMINAL RESPONSIBILITY.—The law of England as to the criminal responsibility of the insane has passed through several stages of development. The views of Coke and Hale (1 P. C. 26–30), who wrote at periods when a scientific classification of the various forms of insanity was practically unknown, were of a somewhat crude description. Both agreed that the act of a madman should not be imputed to him; both drew the familiar distinction between *dementia naturalis* or *a nativitate* and *dementia accidentalis*

or *adventitia* (*vide supra*, p. 46); and the main points on which the writings of Hale mark an advance on those of Coke are (1) his elaboration of the doctrine of *partial insanity* (*vide supra*, p. 46, and *infra*, p. 53), and (2) his statement of the test of responsibility in "melancholy distempers," sometimes spoken of as "the child of fourteen theory." "The best measure I can think of," he said, "is this: such a person as, labouring under melancholy distempers, hath yet ordinarily as great understanding as a child of fourteen years hath, is such a person as may be guilty of treason or felony." See criticism on this in Stephen, *Hist. Crim. Law*, vol. ii. p. 150. In *R.* v. *Arnold*, 1723, 16 How. St. Tr. 764, Mr. Justice Tracy said that a prisoner in order to be acquitted on the ground of insanity must be "a man that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, than a brute or wild beast." *R.* v. *Ferrers* (1760, 19 How. St. Tr. 886) was decided in conformity with this test. On the trial of Hadfield (*R.* v. *Hadfield*, 1800, 27 How. St. Tr. 1281) for shooting at George III. in Drury Lane Theatre, Lord Kenyon, C.J., left the question of responsibility to the jury in the following terms:—"The material part of the case is whether at the very time when the act was committed the man's mind was sane." On the trial of Bellingham (*Times*, May 2, 1812), for the murder of Mr. Percival, the First Lord of the Treasury, in the lobby of the House of Commons, Sir James Mansfield laid down another criterion of criminal responsibility in mental disease, viz. the existence or non-existence in the accused of capacity to distinguish between good and evil in the abstract. The objection to this criterion, of course, was that there are lunatics whose general notions of right and wrong are perfectly correct, and who nevertheless commit acts forbidden alike by law and by morality, under a fixed belief that their conduct is not only pardonable but meritorious. In 1843—after an apparent return in *Oxford's* case (*R.* v. *Oxford*, 1840, 9 Car. & P. 533; 4 St. Tr. N. S. 498) to the test prescribed by Lord Kenyon in *Hadfield's* (*supra*) — there was substituted, on the trial of Daniel Macnaughton for the murder of Mr. Edward Drummond, the private secretary of Sir Robert Peel, for the "*abstract* right and wrong" theory, the question whether the accused knew the nature and quality of the *particular* act with whose commission he was charged at the time of committing it. The House of Lords took the opinion of the judges on the whole question, and the law of England as to the criminal responsibility of the insane is now nominally embodied in the judges' "answers," which were adopted by the House of Lords after a debate, and which are known as "The Rules in *Macnaughton's* case" (see 4 St. Tr. N. S. 847).

Practically they amount to the following propositions: (*a*) Every man is presumed to be sane till the contrary be proved. (*b*) To establish a defence of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason as not to know the nature and quality of the act he was doing (this, it will be observed, is an approval of the test propounded on Macnaughton's trial), or if he did know it, that he did not know he was doing wrong. (*c*) An insane delusion is a defence to a criminal charge only when the imaginary facts would, if really existent, be a legal justification. *E.g.*, A. kills B. under the delusion (1) that B. had slandered him; (2) that B. is trying to kill him. In the former case A. is, in the latter he is not, guilty of murder.

"The rules in *Macnaughton's* case" have been most adversely criticised. It has been pointed out that the House of Lords had no legal right to ask, and that the judges were under no legal obligation to answer, the questions,

since the constitutional right of the House of Lords to take the opinion of the judges arises only on appeals or when the House is acting in its legislative capacity. Again, it has been argued that the rules afford no guidance as to how cases of what is called *moral insanity* (*vide infra*)—in which the character of a person is suddenly changed for the worse, or is by nature insanely perverted—should be dealt with; and, lastly, attention has been called, in connection with the doctrine of partial insanity, to the incongruity of supposing that a man who is admittedly subject to an insane delusion can reason sanely upon that delusion, and calmly argue with himself as to the extent to which he ought to allow it to influence his actions. This last criticism may furnish good ground for an application of the doctrine of modified responsibility in the class of cases with which it deals. But it must be pointed out that in thus localising the range of the immunity from punishment which insane delusion confers, the criminal law is merely following the course which, *mutatis mutandis*, the civil law has now with general acceptance, both in the legal and in the medical profession, adopted in questions of capacity, and which is moreover sanctioned by the disciplinary system that prevails in all institutions for the insane. It is chiefly in connection with cases of "moral insanity"—a generic term covering all those cases in which the moral faculties are more obviously deranged than the mental (kleptomania, erotic mania, pyromania, homicidal mania, irresistible impulse, etc.), that the rules in *Macnaughton's* case have proved unsatisfactory in their practical application. But in recent years a gloss has been put in some cases upon the words "know" and "nature and quality" in the rule marked (*b*), *supra*, which has prevented any appreciable injustice from being done to accused persons by the apparent limitation of the rules to cases of ordinary derangement of the intellectual faculties. The gloss is that no man who is deprived by mental disease (*semble*, whether affecting his reason or his will) of the power of passing a rational judgment on the moral character of the act he is about to do, *knows its nature and quality* within the meaning of the rule above referred to (see Stephen, *Hist. Crim. Law*, ii. 163, and the circuit cases noted in Tuke's *Dictionary of Psychological Medicine*, article "Criminal Responsibility," and also *R.* v. *Davis*, 1881, 14 Cox C. C. at p. 564). The trend of decisions in the American Courts is adverse to the criterion of responsibility laid down in *Macnaughton's* case. See *Parsons* v. *State* (1887, 81 Ala. 577) as a typical example of this tendency; and the doctrine of modified responsibility is, in this country, acquiring considerable influence. See *H.M. Advocate* v. *Dingwall*, 1867, 5 Irvine, 479; *H.M. Advocate* v. *Granger*, 1878, 16 S. L. R. 253; *H.M. Advocate* v. *Smith*, 1893, 1 Adam, 34; *H.M. Advocate* v. *Abercrombie*, 1896, 33 S. L. R. 581, and English authorities referred to in article DRUNKENNESS. In the principal French and German treatises on the medical jurisprudence of insanity considerable prominence is given to the responsibility of epileptics, somnambulists, and, more recently, hypnotic subjects, etc. With us, the question would be solved, so far as the Courts are concerned, by the rules of law above stated, with the aid of expert evidence as to the pathological character of the class of phenomena involved.

Down to 1883, where a plea of insanity *at the time of the commission of the offence* was successfully set up, the jury returned a verdict of "not guilty on the ground of insanity." But the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), substituted for this a verdict of "guilty but insane"—the idea of the Legislature being that the formal conviction recorded in the new verdict might have a deterrent effect on the mentally unstable.

Supervening insanity, if apparent or duly established, is a bar to criminal proceedings at any stage—arraignment, trial, judgment and execution (see 3 Black. *Com.* 25; 1 Hale, P. C. 34). High treason was under 33 Hen. VIII. c. 20 an exception to this rule. But that statute was repealed by 1 & 2 Ph. & Mary, c. 10. As to how and when the plea of insanity is set up, see ARRAIGNMENT and Wood Renton on *Lunacy*, p. 807; also article AYSLUMS, vol. i. at pp. 393, 394 (as to criminal lunatics). A grand jury have no authority by law to ignore a bill on the ground of insanity (*R.* v. *Hodges*, 1838, 8 Car. & P. 195).

THE JURISDICTION IN LUNACY.—*Origin and Present Position of.*—The present position of the jurisdiction in lunacy cannot be explained without a brief reference to its history. The custody of idiots and lunatics (as to the meanings of those terms see, *ante*, vol. vi., at p. 295, and *supra*, p. 46) has from a very early period in England been vested by the law in the Crown. There is some controversy as to whether this prerogative *right* was really a duty—*regium munus*—which the king owed his subjects in return for their obedience, independently of statute (cp. Staundf. *De Pr. Reg.* 33; 2 *Inst.* 14; 4 *Co. Rep.* 126; Bacon, *Abr.* tit. "Idiots and Lunatics" (C); Dyer, 25; 1 Black. *Com.* 303), or whether it was created by the Act, now lost, of Edward I., which the Statute *De Prærogativâ Regis* (17 Edw. II. cc. 9 and 10) confirmed, because of the abuses that had arisen under the earlier law, which gave the custody of idiots and lunatics to the lords (*tutores*; see Fleta, p. 6) of whom their lands were held. The Statute *De Prærogativâ Regis* provided that the king (*a*) should have the custody of the lands of *idiots*, taking the profits of them without waste or destruction, subject to the conditions that he should supply the idiot with necessaries and restore the lands to his heirs after his death (c. 9); and (*b*) in the case of *lunatics*, should see that their lands and tenements were safely kept without waste and destruction, that they and their household were competently maintained out of "the issues of the same," and that the residue was to be kept for their use on recovery, or, if they died, distributed for their soul by the advice of the Ordinary (c. 10). The last provision would now be taken to be a direction to preserve the residue for those entitled to the benefit of the lunatic's estate on his death (see 31 Edw. III. c. 11; 22 & 23 Car. II. c. 10; and article DISTRIBUTIONS, STATUTE OF). It will be observed that under this statute the idiot and the lunatic occupy different positions. In the case of the idiot, the king took the profits of the estate to his own use; in that of the lunatic, he was merely a trustee. The distinction soon became, however, of little importance, as juries returned verdicts of *non compos mentis*, instead of idiocy, wherever they could; and it seems (see 1 Ridgw. Ap. 520) that after the Revolution it became the practice of the Crown to grant the surplus profits of the estate of an idiot to some of his own family. The Statute *De Prærogativâ Regis* is the foundation of the modern jurisdiction in lunacy, and without reference to its provisions some of the distinctive doctrines of the lunacy law, such as the rule against the conversion of a lunatic's property (see vol. iii. p. 363, and *infra*, p. 64), and the grant out of that property of allowances to the lunatic's relatives, and even to collaterals (*infra*, p. 66), are not readily intelligible.

The Crown has, from at least the sixteenth century, exercised its control over the persons and property of lunatics by delegates—first perhaps in point of time by the *Lord Chancellor*, then by the *Court of Wards* (32 Hen. VIII. c. 46), and again by the Lord Chancellor, after the Court of

Wards was abolished (12 Car. II. c. 24). It is of the utmost importance to note, however, that it was not as head of the Court of Chancery that the Lord Chancellor exercised the jurisdiction in lunacy, but as the representative and delegate of the Crown. The theory of the law was that when a person was found idiot or lunatic the sovereign alone had power to grant the custody of him and his estate by sign manual, and therefore, to save repeated applications to the Crown, the power in question was delegated by sign manual, countersigned by two secretaries, to the Lord Chancellor on his coming into office. It was from this warrant that the Lord Chancellor's powers of issuing commissions and making grants of custody were derived. But after the custody was granted, the Lord Chancellor acted in matters relative to the lunatic not under the sign manual but by virtue of his general power as keeper of the king's conscience (see CHANCELLOR); and the orders of the Court of Chancery in matters of lunacy were enforced by attachment, not as being warranted by the sign manual, but by the general power of the Court (cp. *Ex parte Grimstone*, 1772, 2 Amb. 707, and *id.* 2 Sch. & Lef. 438, and 6 Ves. 783). The question of whether a person was idiot or lunatic or not was originally tried principally by writ (for forms, see Fitz. *N. B.* 581, ed. 1652; vol. ii. 232, ed. 1794), afterwards by general commissions (for forms, see Elmer on *Lunacy*, 7th ed., App. x. No. 18), issuing by letters patent under the Great Seal from the common law side of the Court of Chancery (4 *Inst.* 80, 81), directed to five persons as commissioners, who, or any three or more of them, were to inquire, upon the oaths of good and lawful men of the county, whether the party named in the commission was idiot or lunatic or not, and as to the extent or value of his property. In 1842 the Lord Chancellor was empowered by statute (5 & 6 Vict. c. 84; see secs. 1, 3, 13, 14) to appoint two fit persons, being serjeants-at-law, or barristers of not less than ten years' standing, called "Commissioners in Lunacy" (as to the modern Commissioners in Lunacy and their functions, see article ASYLUMS, vol. i. at p. 381), to whom commissions might be directed. In 1845 the name of "Masters in Lunacy" was substituted for that of Commissioners in Lunacy (8 & 9 Vict. c. 100, s. 2). The *Masters in Lunacy* are barristers of at least ten years' standing at the date of their appointment (L. A., 1890, s. 11 (3)), appointed by the Lord Chancellor to exercise such of the powers of the "Judge in Lunacy" (a term meaning either "the Lord Chancellor for the time being intrusted under the Royal sign manual with the care and commitment of the custody of the persons and estates of lunatics acting alone or jointly with any one or more of such judges of the SUPREME COURT as may for the time being be intrusted as aforesaid, or by one or more of such judges as aforesaid" (L. A., 1890, s. 108 (1), and see *infra*, p. 56)) as are conferred on them by the Acts and the Rules (as to which, see L. A., 1890, s. 338 (2), and L. A., 1891, s. 27 (2)). The functions of the masters will be dealt with more particularly below. But it may here be stated generally that they include the holding of inquisitions or summary inquiries and the making of most of the consequential orders dealing with the persons and estates of lunatics. It is now proposed to confer on the masters the entire jurisdiction of the Judge in Lunacy, subject to the rules and to the annulment or variation of their orders on appeal (see Lunacy Bill, 1897; H. L. 171, s. 29). Each of the Masters in Lunacy receives a salary of £2000 a year, and together with the *Chancery Visitors* (as to whom, see article ASYLUMS, vol. i. at pp. 382–3) they form a Board, with offices in the Royal Courts of Justice. It only remains to notice in this connection the duties of the *Lords Justices* in

lunacy matters. Sec. 17 (3) of the Judicature Act, 1873, provided that the jurisdiction in lunacy of the Lord Chancellor, and the Lords Justices of Appeal in Chancery, who were appointed by 14 & 15 Vict. c. 83 to hear appeals from the Master of the Rolls and the Vice-Chancellors, and on whom lunacy jurisdiction was conferred by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70, s. 2), should not be transferred to the High Court; while sec. 18 (3) transferred to the Court of Appeal all jurisdiction vested in, or capable of being exercised by, Her Majesty in Council on appeal from any order in lunacy made by the Lord Chancellor. Sec. 7 of the Judicature Act, 1875, provided that the jurisdiction in lunacy of the Lords Justices of Appeal in Chancery should be exercised by such judge or judges of the High Court as might be intrusted therewith by the sign manual, etc. The Lords Justices in Lunacy act as additional judges of the Chancery Division in accordance with a request by the Lord Chancellor (who received the necessary power to make it by sec. 51 of the Judicature Act, 1873) in a letter dated 10th November 1875, and set out in *In re Platt*, 1887, 36 Ch. D. at p. 411. This jurisdiction can only be exercised in aid of the jurisdiction in lunacy (*In re Barber*, 1888, 39 Ch. D. at p. 188). It applies to all applications in lunacy which require also an exercise of the jurisdiction of the *Chancery Division* (*In re Platt, ubi supra*, at p. 410). The mere fact of the existence of unsoundness of mind does not oust jurisdiction which the Chancery Division inherently possesses (*e.g.* over infants), and such jurisdiction may be exercised independently of, and without recourse to, the jurisdiction in lunacy. But where the latter jurisdiction has been invoked, in so far as it has been brought into operation, it supersedes the jurisdiction of the Chancery Division (cp. *In re Arrowsmith's Trusts*, 1858, 4 Jur. N. S. 1123; *In re Edwards*, 1879, 10 Ch. D. at p. 608; *Vane* v. *Vane*, 1876, 2 Ch. D. 124; *In re Brandon's Trusts*, 1879, 13 Ch. D. 773; *In re Bligh*, 1879, 12 Ch. D. 364; *Beall* v. *Smith*, 1873, L. R. 9 Ch. at p. 92; and see saving in sec. 143 of L. A., 1890). The *Master of the Rolls*, as such, has no jurisdiction in lunacy, but may be intrusted, etc., under sec. 108 of the Lunacy Act, 1890, as a judge of the Supreme Court. The *County Courts* may exercise jurisdiction in the following cases: (1) Where a reception order is made in the case of a lunatic, the value of whose real and personal property is under £200, and no relative or friend of the lunatic is willing to undertake the management of such property (L. A., 1890, s. 132); this section gives no power, however, to a County Court judge to make a vesting order with regard to stock standing in the name of a lunatic, even if the value of the property affected by it is under £200 (*In re Noyce*, [1892] 1 Q. B. 97 and 642, and *In re Shortridge*, [1895] 1 Ch. at p. 286); (2) under sec. 35 (*a*) of the Partnership Act, 1890, where the assets do not exceed in amount or value £500 (see vol. iii. at p. 532, and County Courts Act, 1888, ss. 84, 85); and (3) upon application by the guardians of any union for payment of expenses incurred by them in relation to a lunatic (L. A., 1890, s. 300, and vol. iii. at p. 549).

Modes in which the Jurisdiction in Lunacy is exercised.—Under this head fall to be considered—

I. *Inquisitions.*
II. *Summary proceedings* (1) *under sec.* 116 *of the Lunacy Act*, 1890; (2) *in small cases.*
III. *Traverse.*
IV. *Proceedings consequential on inquisitions.*
V. *Supersedeas.*

I. INQUISITIONS.—An inquisition may be ordered on a report of the Commissioners in Lunacy to the Lord Chancellor (L. A., 1890, s. 100), and in the case of applications under sec. 116 (*infra*, p. 60), on a petition presented by the direction of the masters (R. L., 1893, rr. 1 and 2). It is, however, usually directed to be held on the application of a near relative of the alleged lunatic; and, indeed, the petition for an inquisition by which the proceedings are commenced ought to be presented by the nearest relative (see *Ex parte Persse*, 1828; 1 Mol., per Hart, L.C., at p. 220). It may, however, if the circumstances render it necessary, be preferred by an executor (Shelf. *Lunacy*, 114), a trustee (*ibid.*), a tenant (*Ex parte Ogle*, 1808, 15 Ves. 112), a creditor (*In re Bell*, 1809, 2 Coop. *t.* Cott. 163), or the Attorney-General (1 Coll. *Lun.* 125). The Attorney-General may also bring an action on behalf of a lunatic where no committee has been appointed or the committee has an adverse interest (*A.-G.* v. *Parkhurst*, 20 Car. II. 1 Ch. Cas. 112; *A.-G.* v. *Woolrich*, 1669, *ibid.* 153; *A.-G.* v. *Tyler*, 1764, 2 Eden, 230) [in this case, there must be a relator, not the lunatic, to be responsible to the defendant for costs (*A.-G.* v. *Tyler*, *supra*)]; or even by an absolute stranger (see *Ex parte Ward*, 1801, 6 Ves. 579). The petition is supported by affidavits by medical men—preferably unconnected with lunatic asylums (see *In re Anon.*, 1844, Drur. 286)—and others (if necessary), setting forth the facts that show the incapacity of the alleged lunatic. The Judge in Lunacy may require an affidavit of property at this stage, and frequently does so. The petition and evidence in support of it are filed at the masters' office, and brought before the judge (one of the Lords Justices) without previous consideration by the masters (R. L., 1892, r. 18), and, if they are satisfactory, the order for an inquisition is made. As to the inspection of documents in lunacy, see *In re Wood; Banner* v. *England*, 1863, 4 De G., J. & S. 134; *In re Ferrior*, 1867, L. R. 3 Ch. 175, 182; *In re Smyth*, 1880, 15 Ch. D. 286; 1881, 16 Ch. D. 673; *Vivian* v. *Little*, 1883, 11 Q. B. D. 370; *London and Yorkshire Bank* v. *Cooper and Others*, 1885, 15 Q. B. D. 7 and 473; *In re H. W. Strachan*, [1895] 1 Ch. at p. 443; and *In re Hinchcliffe*, 1894, W. N. 179; [1895] 1 Ch. at p. 117 (a case as to exhibits).

The order for the inquisition specifies whether the inquisition is to be with or without a jury. The inquisition is with a jury (1) if the alleged lunatic being within the jurisdiction demands it (L. A., 1890, s. 90 (2)), unless the judge is satisfied that the alleged lunatic is not competent to form and express a wish in that behalf (s. 91), and even in such cases the masters have power to direct an inquisition before a jury upon consideration of the evidence (s. 93); (2) if the alleged lunatic is out of the jurisdiction (s. 96); (3) if the master certifies under sec. 93, *supra*; (4) where the Judge in Lunacy directs it, although the alleged lunatic being within the jurisdiction has not demanded it (s. 92, by implication).

The order for the inquisition also directs the inquisition to be held (1) at or near the place of abode of the alleged lunatic, if within the jurisdiction (see *Ex parte Southcot*, 1751, 2 Ves. 405; *Ex parte Hall*, 1802, 7 Ves. 261); and (2) where the alleged lunatic is not within the jurisdiction (*a*) at the place in England where his mansion-house or other property is situated (*Ex parte Southcot, supra*); (*b*) if he have no such property, then at his English residence (*In re Stevens*, 1819, 2 Coop. *t.* Cott. 150); (*c*) if he have no such residence, then in the county of Middlesex (*In re Hodsell*, 1743, cit. 1 Amb. 110; *In re Lyon*, 1836, 2 Coop. *t.* Cott. 150; *In re Webb*, 1846, *ibid.* 145; *In re Scott*, 1874, 22 W. R. 748).

The rules above stated might be departed from in cases where a strong

local feeling as to the proceedings existed in the place where the alleged lunatic resided (see *In re Anon.*, 1881, 18 Ch. D. 26), and query whether—in spite of *Ex parte Baker*, 1815, 19 Ves. 340—the convenience of witnesses and, *ceteris paribus*, even of counsel might not be considered (see *In re Green*, 1831, cit. Shelf. *Lun.* at p. 123; *In re Mills*, 1830, cit. 2 Myl. & Cr. 39 *n.* (*a*); *In re Waters*, 1836, 2 Myl. & Cr. 38). The Judge in Lunacy has a discretion to quash an inquisition executed at a place other than that named in the order (*Ex parte Hall*, 1802, 7 Ves. at pp. 263, 264).

A commission may issue against an alien (*In re Bariatinski*, 1843, 1 Ph. Ch. 375) (*a*) resident within the jurisdiction, either temporarily or permanently, and possessing property there; (*b*) resident abroad but possessing property here; (*c*) resident within the jurisdiction without possessing property there (see *In re Houstoun*, 1826, 1 Russ. 312); against a subject resident out of but possessing property in England (see *Ex parte Southcot*, 1751, 2 Ves. 401; *In re Stevens*, 1819, 2 Coop. *t.* Cott. 150, and other cases there cited; or possessing property out of but resident in England (*In re Tottenham*, 1837, 2 Myl. & Cr. 39, and cases there cited)); and against an infant (see *Beall* v. *Smith*, 1873, L. R. 9 Ch. at p. 92).

Where the lunacy of a person is in question, the Court may interpose by making a provisional order for the care and custody until the lunacy is finally determined (*In re Heli*, 1748, 3 Atk. at p. 635; *In re Pountain*, 1888, 37 Ch. D. 609); and for examples of other interlocutory orders of a similar character, see *In re Frank*, 1825; Shelf, *Lunacy*, 160, 161 (interim receiver); *In re King*, 1827, *ibid.* 159 (order restraining interference with lunatic's property); *In re Bullock*, 1886, 35 W. R. 109 (allowance for household expenses and expenses of defence).

An action will lie for maliciously suing out a commission; want of probable cause must be proved (*Turner* v. *Turner*, 1818, Gow, 28; *Incledon* v. *Berry*, 1805, Seliv. N. P. 1006), and, *semble*, also that the commission has been superseded (see *Whitworth* v. *Hall*, 1831, 2 Barn. & Adol. 659, and other bankruptcy cases).

A commission cannot be compromised so as to make the compromise binding on the alleged lunatic (*Cumming* v. *Ince*, 1847, 11 Q. B. 112). This is really an application of the doctrine of ESTOPPEL. An inquisition will not be granted unless it is necessary for the benefit of the lunatic (see *Brodie* v. *Barry*, 1813, cit. 1 Ves. & Bea. 59; *In re Clare*, 1846, 3 Jo. & Lat. 571). On the other hand, an inquiry may be ordered though the motive of the petitioner is bad (*Ex parte Ogle*, 1808, 15 Ves. 112), care being taken, of course, that such a petitioner has no control over the person and property of the lunatic (*In re Clare, ubi supra*).

After all the preliminaries have been settled, the masters (who take inquisitions in rotation) fix a day for holding the inquiry and sign a "precept" or notice of the inquiry addressed to the sheriff of the county, if there is to be a jury, directing him to summon a jury (in practice) of thirty-four to inquire into the alleged lunacy. If there is to be no jury, the precept is addressed to the solicitor having the carriage of the commission, and should be retained by him. The proceedings at inquisitions are public. But restrictions have been placed on the right to attend and take part in the inquisition and subsequent proceedings at the cost of the estate. The governing considerations as to granting leave to attend, etc., are the benefit of the alleged lunatic and the elucidation of the truth (see *R.* v. *Daly*, 1749, 1 Ves. 269; *In re Nesbitt*, 1847, 2 Ph. Ch. at p. 246; *In re Scarlett*, 1873, L. R. 8 Ch. 739). The same considerations determine the question as to

who is to have what is called "the carriage" of the commission (*In re Webb*, 1846, 2 Ph. Ch. 12). The attendance of witnesses is procured by summons under the hand and seal of the master. Any person disobeying any summons or order for attendance will be guilty of contempt. As to the power of a Master in Lunacy to deal with contempts, see vol. iii. p. 314.

Where the inquisition is with a jury, the inquiry is opened by the under-sheriff calling over the panel. The general commission and special order or special commission (a special commission would now only be issued where both masters were personally interested or for some similar reason—*In re Braithwaite*, 1823; see Pope on *Lunacy*, p. 49, note (*o*)) are then read over, and the jury are sworn. Where there is no jury, counsel for the petitioner opens the case at once, and then calls evidence in support of it. Counsel in proceedings against an alleged lunatic ought to act in the judicial spirit expected from counsel for the prosecution in criminal cases (per Bowen, L.J., *In re B.*, [1892] 3 Ch. 198). The witnesses are examined, cross-examined, and re-examined in the usual way. An important feature in the trial of an inquisition is the personal examination of the alleged lunatic. The object of this examination is to enable the master or the jury to form an opinion as to the state of the alleged lunatic's mind; and the alleged lunatic has a right to insist that it shall take place. The examination may be on oath or otherwise (L. A., 1890, s. 92), and may be held either in open Court or in private, as may be directed (s. 94 (2); and L. A., 1891, s. 26 (1)). At the close of the reply for the petitioner the master, if sitting without a jury and if not desirous to use his powers of further inquiry (s. 92), or of certifying for trial by a jury (s. 93), certifies his finding, and his certificate has the same effect as an inquisition taken upon the oath of a jury (s. 95). If the inquisition is with a jury the master sums up the evidence and the jury return their verdict, in which twelve at least must concur, whether the alleged lunatic is of unsound mind or not (s. 97).

An inquisition may be quashed on the ground of (1) *irregularity in the proceedings*, as, *e.g.*, (*a*) where material evidence has been improperly rejected (cp. *Anon.* cit. in *R.* v. *Daly*, 1749, 1 Ves. at p. 270); or (*b*) where there has been misconduct on the part of the jury (*Ex parte Roberts*, 1743, 3 Atk. at p. 6; *Rochfort* v. *Lord Ely*, 1768, 1 Ridgw. Ap. at p. 541), or (*c*) contravention of the order as to the place of trial (*Ex parte Hall*, 1802, 7 Ves. 260); or (2) *material variance between the return and the commission* (see such cases as *Ex parte Ashton*, 1744, 3 Atk. 169; *Ex parte Barnsley*, 1744, *ibid.* 168; *Sherwood* v. *Sanderson*, 1815, 19 Ves. at p. 286).

Where an inquisition is quashed a new commission and not a writ AD MELIUS INQUIRENDUM (see vol. i. p. 133 for authorities) is issued (unless at the suit of the Crown), and this may be done without a fresh petition being ordered. The issue on an inquisition is "whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself and his affairs" (L. A., 1890, s. 98 (1)); but note that it may be specially found and certified that the lunatic, though incapable of managing his affairs, is capable of managing himself, and is not dangerous to others (s. 98 (2)), and—without the direction of the person holding the inquisition — no evidence as to the lunatic's acts, etc., at any time being more than two years before the inquisition is to be receivable (s. 98 (1)). As to the construction of this subsection, see *In re Danby*, 1885, 30 Ch. D. 320, following *In re Stamper*, 1877, cit. *ibid.*, and dissenting from the opinion of James, L.J., in *In re Sottomaior*, 1874, L. R. 9 Ch. at p. 680.

As to the abuses which led to the enactment of the subsection, see *In re Windham*, 1862, 31 L. J. Ch. 720.

An inquisition may be held before a jury by an issue in the High Court (s. 94 (1)). So far only one such inquisition has been held (see *In re Scott*, 1884, 27 Ch. D. 116).

II. SUMMARY PROCEEDINGS.—(1) *Under sec.* 116 *of the Lunacy Act*, 1890.—This section enables the Judge in Lunacy (a term which for this purpose includes the master, unless his order is annulled or varied by the judge (L. A., 1891, s. 27 (1)—to whom an appeal lies under R. L., 1892, r. 11)) to apply the wide powers of management and administration under the Acts (see *infra*, p. 63), without inquisition, to lunatics not so found, for the protection or administration of whose property any order was made before the commencement of the Act of 1890, s. 116 (1) (*b*); to every person lawfully detained (*i.e.* detained within the jurisdiction—*In re Watkins*, [1896] 2 Ch. 336) as a lunatic, though not so found by inquisition (*ibid.* (*c*)); to every person not so detained and not found a lunatic by inquisition with regard to whom it is proved to the satisfaction of the judge that such person is through mental infirmity arising from disease or age incapable of managing his affairs (*ibid.* (*d*)), though not a lunatic (L. A., 1891, s. 27 (4)) (as to what is incapacity within the meaning of this clause, see *In re Dewhirst's Trusts*, 1886, 33 Ch. D. 416; *In re Martin's Trusts* 1886, 1887, 34 Ch. D. 618; *In re Barber*, 1888, 39 Ch. D. 187; *In re Campbell*, 1888, W. N. 1888, 176); to every person with regard to whom it is proved that he is of unsound mind and incapable of managing his affairs, and that his property does not exceed £2000 in value or yield an annual income of more than £100 (*ibid.* (*e*)); to any person who is or has been a criminal lunatic and continues to be insane and in confinement (*ibid.* (*f*)) if for the lunatic's benefit (see *In re Price*, 1887, 34 Ch. D. 603; *In re Brice*, 1888, W. N. 40). Applications under this section, which are very common, are made by summons before the master, supported by affidavits. The order appoints a person (in cases of dispute as to who shall be appointed, frequently the OFFICIAL SOLICITOR) to exercise the statutory powers (s. 116 (2)). The person so appointed is subject to the authority of the judge as if he were a committee (see *infra*, p. 62; *ibid.* (3)); the powers are to be exercised for the lunatic's benefit (*ibid.* (4)), and no alteration is made in the law as to the liability of a lunatic's property to claims of creditors (*ibid.* (5)).

(2) *In Small Property Cases.*—See sec. 116 (1) (*e*) in (1), *supra*. As to the powers of the County Courts in such cases, see *ante*, p. 56. There are also provisions extending the powers of management and administration to property (not exceeding £2000 in value or yielding more than £100 in annual income) in Ireland and *vice versâ* (L. A., 1890, s. 130 (1) (4)).

III. TRAVERSE.—As to TRAVERSE generally, see that heading. An inquisition may be traversed by (1) the lunatic so found (otherwise than on an issue in the High Court, as to which, see *infra*, p. 61, *ex debito justitiæ*, if the judge is satisfied that the application is really that of the party desiring to traverse, and that he is mentally competent to form and express the wish to do so (cp. *In re Cumming*, 1852, 1 De G., M. & G. 548)); (2) the husband or wife of the lunatic (cp. *In re Nugent*, 1817, 2 Mol. 517); (3) an alienee (*Sherwood* v. *Sanderson*, 1815, 19 Ves. 287) or other person having a legal or equitable title to or interest in his estate (Vin. *Abr.* tit. "Lunatic"). The Crown cannot traverse, nor is a *melius inquirendum* now issued; the proper course is to apply for another commission. An inquisition cannot be traversed after the death of the lunatic by the heir-at-law or anyone else, for the party on every traverse may be required to

appear in person (per Lord Hardwicke, L.C., in *In re Roberts*, 1743, 3 Atk. 312). The procedure is by petition (R. L., 1892, r. 17) filed at the master's office within three months next after the day of the return (L. A., 1890, s. 101 (1)); otherwise the right is barred unless the judge grant an extension of time (*ibid.* s. 102). The petition should be supported by affidavits verifying the allegations contained in it (which should be filed with the petition) (R. L., 1892, r. 18). The petition and evidence are dealt with by the judge out of Court without previous consideration by the master (*ibid.* rr. 23, 18). If leave is granted, the judge must in his order (1) limit a time, not exceeding six months from the date of the order, within which the parties are to proceed to trial (L. A., 1890, s. 101 (2),—as to the meaning of "proceed to trial," cp. *Ex parte Saffery*, 1877, 5 Ch. D. 365),—and (2) may also in his order require the petitioner (*not being the object of the inquisition*) to give security to the master within three weeks from the order for all parties proceeding to trial within the time limited (*ibid.* subs. (3)). Neglect or failure to give such security or proceed to trial bars the right to traverse unless the judge grants an extension of time. The traverse is drawn up and filed in the Crown Office. Issue is joined in the name of the Attorney-General, and a *venire facias* is awarded returnable into the Queen's Bench Division. The trial may take place either in London or at the assizes (*Ex parte Ferne*, 1801, 5 Ves. 832), and may be directed to be held, if desirable, in a county other than that in which the commission was executed (*In re Nugent*, 1817, 2 Mol. 517). The trial will usually be by special jury. The lunatic must be present (*Ex parte Roberts*, 1743, 3 Atk. 7), and, if necessary, a *habeas corpus* will be granted to secure his attendance (cp. *In re Turner*, 1824, cit. Shelf. *Lunacy*, 151). The evidence is limited to the matters specified in sec. 98 (1) of the L. A., 1890 (*vide supra*, p. 59), and, *semble*, the judge has no power to relax the rule which that subsection lays down. The verdict on a traverse is returnable into the Crown Office. If it confirms the finding, the proceedings in lunacy are at once continued (see IV. *infra*). If it reverses that finding they are arrested. As to second traverses, see L. A. s. 103. In the case of an inquisition on an issue in the High Court (*vide supra*, p. 60) no traverse is allowed, but application may be made for a new trial or a new inquisition (L. A. s. 104).

IV. PROCEEDINGS CONSEQUENTIAL ON INQUISITIONS.—After inquisition found, the party having the conduct of the proceedings takes out a summons to inquire into the following points—(*a*) the lunatic's age, position in life, and residence; (*b*) the nature of the lunacy; (*c*) who are next-of-kin and heir-at-law; (*d*) who ought to be appointed committees of his person and estate; (*e*) of what his property consists; (*f*) the amount of his income; (*g*) allowance for past and (*h*) future maintenance. The summons is disposed of by the Master in chambers.

Of the heads of inquiry above mentioned (*a*) and (*b*) require no notice. The others must be briefly dealt with.

(*c*) *Heir-at-law and Next-of-kin.*—The inquiry under this head (1) need not be held where an order has been made (see L. A., 1890, s. 148 (4)) exempting the lunatic's estate from payment of fees (R. L., 1892, r. 36), and (2) may be deferred or carried on to a limited extent at the discretion of the Master (R. L., 1892, r. 37), who may also dispense with or disallow attendance of the heir-at-law or next-of-kin, either wholly or except at their own expense (*ibid.* r. 39). The next-of-kin are, as a matter of convenience, preferred to the heir-at-law for the committeeship of the person; *aliter*, as regards committeeship of estate (cp. *In re Lord Bangor*, 1818, 2 Mol. 518; *In re Webb*, 1848, 2 Ph. Ch. at p. 553).

(*d*) *Committees.*—The committees of a lunatic correspond generally to the tutors and curators of the civil law (see Hunter, *Introduction to Roman Law*, p. 37). In the case of lunatics so found (unless a special verdict limiting the effect of the inquisition to property has been found under sec. 98 (2)) there is a commitment both of the person and of the estate. In some points the committeeships resemble each other. But it is convenient to treat them separately, merely premising, by way of general observation, that while they may be held by the same person they are now usually distinct, and that joint committees are now frequently appointed.

The Committee of the Person.—The judge has full discretion as to who shall be appointed committee of the person; but the following rules are kept in view:—The committee, being responsible for the comfort of the lunatic, should be resident within the jurisdiction (cp. *Ex parte Ord*, 1821, Jac. 94; *In re Bruère*, 1881, 17 Ch. D. 775; but see *In re Hopper*, 1897, 66 L. J. Ch. 569). His place of residence should be such as to admit of his visiting the lunatic frequently, if the latter does not reside with him (see *Ex parte Fermor*, 1821, Jac. 405). An undertaking as to visitation is now given by the committee of the person (see R. L., 1893, r. 4). Relations are preferred to strangers (see *In re Watkins*, 1846, 1 Coop. *t.* Cott. 225). But strangers may be appointed in case of the misconduct or incapacity of relations (see *Lady Cope's* case, 29 Car. II. 2 Ch. Cas. 239; *In re Jones*, 1825, Shelf. *Lun.* 178). The wishes and inclinations of the lunatic, even if unreasonable (*In re Dyce Sombre*, 1844, 8 Jur. 817) will be regarded (*In re Leacocke*, 1838, L. & G. *t.* Pl. 502). *Ceteris paribus*, a committee of the same sex as the lunatic will be preferred (*Ex parte Ludlow*, 1731, 2 P. Wms. at p. 637). The custody of a lunatic may be granted to a married woman (*Ex parte Kingsmill*, 1720, 3 P. Wms. 111. *n.* (B.)); but it is usual to join the husband with her in that office (*Ex parte Lyne*, 1735, Ca. *t.* Talb. 143).

Duties and Position of Committee of Person.—He may settle and change the residence of the lunatic (as to committal to an asylum, etc., see ASYLUMS, *Reception after Inquisition*, vol. i. at p. 372), subject to (1) any directions in the order appointing him; (2) the duty of keeping within the allowance for maintenance (*vide infra*, p. 66); (3) the duty of not removing the lunatic out of the jurisdiction without the leave of the judge. As to when such leave will be granted, see *In re Jones*, 1844, 1 Ph. Ch. 461; *In re Halkett*, 1854, 3 Ir. Ch. 375; *In re Stair*, 1846, 1 Coop. *t.* Cott. 227 (requirement of security in such cases). The committee of the person has a wide discretion as to seeing to the comfort of the lunatic and his protection from designing persons. He must comply with his undertaking as to visitation, and facilitate visitation by the Chancery Visitors, by giving them notice as to change of address (R. L., 1893, r. 11), and make half-yearly reports as to bodily and mental condition, and at other times when required (R. L., 1892, r. 108). If the committee of the person is authorised to retain any effects of the lunatic, he has to sign an inventory thereof, and an undertaking to deliver up the same when required to do so (R. L., 1893, r. 4; and see R. L., 1892, r. 120). A committee of the person ordinarily receives no remuneration, but an allowance for the expenses of visitation may be made to him.

The Committee of the Estate.—The considerations above mentioned (*supra*, p. 62) in connection with the appointment of the committee of the person—as to the preference of relations to strangers and residence, apply *mutatis mutandis* to the appointment of the committee of the estate. But in the case of the latter, the difficulty as to residence may be overcome by such

expedients as the appointment by the committee of an agent to superintend details (*In re Brown*, 1849, 1 Mac. & G. 20); or the appointment of a receiver (see *infra*, p. 63) by the Court (see *In re Seaman*, 1808, Shelf. *Lun.* 187), etc.; and there are certain points in regard to which the appointment of a committee of the estate stands on a different footing from that of the committee of the person, viz. the heir-at-law is preferred to the next-of-kin (*vide supra*, p. 61), and the objection to the appointment to the committeeship of such persons as the solicitor under the commission is stronger.

A committee of the estate has no right to any allowance for his trouble (cp. *In re Annesley*, 1749, Amb. 78), even though the next-of-kin consent. But an allowance may be granted where it is for the benefit of the estate (cp. such cases as *Ex parte Fermor*, 1821, Jac. 404; *In re Walker*, 1848, 2 Ph. Ch. 630; *In re Weld*, 1882, 20 Ch. D. 451).

The committee of the estate, who is a mere bailiff (cp. *Isaacs* v. *Chinery*, 1896, 12 T. L. R. at p. 302), is now to all intents and purposes invariably required to find security. The obligation to perfect the security arises whenever the order for the appointment of the committee has been approved by the Judge in Lunacy; the period, usually limited, is three weeks (Elmer, *Lunacy*, p. 73); and the order appointing the committee takes effect only when the security is perfected (R. L., 1892, r. 117). Three forms of security have been recognised: (1) a bond—the execution of which is attested by two witnesses, and which may be enforced in case of default by *scire facias* (*q.v.*); (2) payment into Court (see R. L., 1892, r. 71, and, as to enforcement of such security, Supreme Court Funds Rules, 1894, VI.); (3) the bond of a guarantee society, of whose solvency and respectability the Master in Lunacy is satisfied (see forms of such bonds in Wood Renton on *Lunacy*, Appendix, pp. 1049, 1050). There are provisions in the Rules in Lunacy for the reduction, increase, and change of the security (R. L., 1892, r. 70; *ibid.* r. 19).

The security is discharged on the death of the lunatic, the supersedeas (*vide infra*) of the inquisition, the discharge or death of the committee of the estate (cp. R. L., 1892, r. 81), and the substitution of fresh security (*vide infra*, p. 64); and the security will not in general be discharged till all the accounts have been passed (*vide infra*, p. 64). As to how the discharge is effected, see R. L., 1892, r. 82, and Supreme Court Funds Rules, 1894, rr. 44 *et seq.*).

The security is, in practice, fixed at twice the amount of the gross income, and twice the amount of any personal securities over which the committee (or receiver) might have control. The security is discharged on the death of the lunatic, the supersedeas (*vide infra*, p. 66) of the inquisition, the discharge or death of the committee of the estate, and the substitution of fresh security. The powers of management and administration exercised by the committee over the estate of a lunatic, with the sanction or by the order of the Judge in Lunacy, are of the widest character. They embrace (i.) the *raising of money* by sale, charge, mortgage, etc., to make provision for payment of the lunatic's debts, or for his past or future maintenance (L. A. s. 117 (1) (2)); (ii.) *charges* for permanent improvements (*ibid.* s. 118 (1); and see subsecs. (2) and (3)); (iii.) *sale* of any property belonging to the lunatic (see 120 (*a*); *In re Ware*, [1892] 1 Ch. 344; *In re Baggs*, 1893, [1894] 2 Ch. 416 *n.*; *In re Salt*, [1896] 1 Ch. 117; *In re X.*, [1894] 2 Ch. 415; L. A., 1890, s. 120 (*a*); and ss. 45, 61, and 62 of S. L. A., 1882; and *In re Ray's Settled Estates*, 1884, 25 Ch. D. 464); as to cases in which recourse to Settled Estate Act, 1877, is still necessary, see Dart, *Vendors and Purchasers*, 1294–95); as to sale under Lands Clauses Acts, see L. C. A.,

1845; (iv.) *exchange or partition* (s. 120 (*b*)); (v.) carrying on of *trade or business* of lunatic (*ibid.* (*c*)); (vi.) the grant of *building* or *agricultural* leases (*ibid.* (*d*))—as to fee allowed to lessor's solicitor (under Solicitors Remuneration Act, 1881, Gen. Ord. Sched. 1, part 2, first scale, see *In re McGarel*, [1897] 1 Ch. 400; grant of leases of minerals (*ibid.* (*e*)); (vii.) *surrendering* leases, acceptance of surrenders and acceptance of a grant of *new leases* ((*f*) and (*g*)); (viii.) execution of *powers of leasing* (*ibid.* (*h*))—powers under the Settled Land Act can be exercised under this clause (*In re Salt, ubi supra*); (ix.) performance of any contract relating to property entered into by lunatic before lunacy ((*i*); see *Affleck* v. *Affleck*, 1856–57, 3 Sm. & G. 394, 402); (x.) surrender of *onerous property* (*j*); (xi.) entering into agreement touching augmented cures, and (xii.) exercise of *beneficial* (*l*) or *fiduciary* (s. 128) powers (see further, *In re Shortridge*, [1895] 1 Ch. 278). The provisions of sec. 120, summarised above, are not exclusive (see *In re Browne*, [1895] 43 W. R. 175). As to extent of leasing power, see sec. 132; and as to the rule against the conversion of a lunatic's property, see CONVERSION OF PROPERTY, vol. iii. p. 363.

The committee of the estate is required annually, or at such longer or shorter periods as the Master fixes, to pass his accounts of receipts and payments in respect of the lunatic's estate (R. L., 1872, r. 73). If he makes default in this duty, his remuneration, if any, may be disallowed, interest at 4 per cent. may be charged on cash improperly retained, and he may be removed from office, deprived of his costs, and even attached (cp. R. L., 1892, r. 78; *In re Lockey*, 1845, 1 Ph. Ch. 509; *Ex parte Clarke*, 1 Ves. Jun. 295 (*a*); *In re Owen*, 1812, Shelf. *Lun.* 240). A distinction may conveniently be drawn between the committee's first, subsequent, and final accounts. The *first* account is left at the Master's office. The examination of it may be adjourned from time to time, but the committee should have his evidence ready so as to complete it, if practicable, at a single sitting. He must satisfy the Master that his sureties are living, and that neither of them has been adjudicated bankrupt or has compounded with his creditors. In default of such proof the Master will require fresh security (r. 75), and, if that is not forthcoming, may proceed to appoint a new committee (rr. 79, 80). If the Master is satisfied with the committee's account, he allows it to pass, and the committee must pay any balance certified to be due into Court. The same procedure is followed with regard to *subsequent* accounts. But in their case, proof of payment into Court of the balance of the last preceding account is necessary; and the costs of such payment should be included in the account. The *final* account is taken on discharge, or on death of lunatic. The procedure is substantially identical with that followed on the first account, save that it naturally contains provision for the payment of any balance due to or by the committee. The final passing of a committee's accounts does not relieve him from liability for moneys received by him in another capacity (see *Wright* v. *Chard*, 1859, 4 Drew. 673).

A *receiver* of the estate of a lunatic may be appointed where it is deemed expedient (R. L., 1892, r. 83), *e.g.* where a suitable committee cannot be found, or an objection exists to a proposed committee, or the management of the estate is attended with difficulty. As to class of persons eligible, etc., see considerations stated *supra* with reference to committees of the estate. The general duties of the receiver are to pay moneys received into Court, and to obtain the consent of the Court to extraordinary expenditure, *e.g.* expenditure on bringing (*Wynne* v. *Lord Newborough*, 1790, 1 Ves.

at p. 165) or defending (*In re Anon.*, 1801, 6 Ves. 287; *Swaby* v. *Dickon*, 1833, 5 Sim. 629) actions, letting the estate (per Lord Eldon, L.C., in *Morris* v. *Elme*, 1790, 1 Ves. at p. 138 (*a*); and cp. *Fletcher* v. *Dodd*, 1789, 1 Ves. at p. 185), or repairs (cp. *Ex parte Marton*, 1805, 11 Ves. 395), except of a simple and inexpensive character (*s. c.*, and *Ex parte Hilbert*, *ibid.*; *Ex parte Hall*, 1821, Jac. 160). See further, RECEIVERS, as to general powers and duties.

The chief grounds on which a committee of the person or of the estate may be *removed* from his office, or on which his tenure of the office may cease, are non-residence (*vide ante*, pp. 62, 63), death of the lunatic or supersedeas (*vide infra*, p. 66) of the inquisition, misconduct, bankruptcy, application for discharge, expiration of order for commitment of the person.

(*e*) *Property of Lunatic.*—This is the next point of inquiry. The Master may also hold an inquiry as to debts due by the lunatic (cp. R. L., 1892, r. 87). The Master has power to refuse to make an order for the payment of a lunatic's debts unless it clearly appears that a sufficient maintenance (as to which, see (*h*), *infra*, p. 66) for the lunatic will remain. This proposition rests upon a long series of authorities (which cannot be examined here), ranging from *Ex parte Dikes* (1802, 8 Ves. 79) to *In re Pink* (1883, 23 Ch. D. 577). See also EXECUTION, vol. v. at pp. 154, 155. If the lunatic's estate is sufficient, however, even debts due only morally may be paid (cp. *In re Hewson*, 1852, 21 L. J. Ch. 825). But this rule will not be applied in favour of "debts of honour" in the sense of gambling transactions (cp. *In re Whitaker*, 1889, 42 Ch. D. 119).

An attempt to extend the power of the Court in Lunacy to postpone or defeat the rights of creditors over the property of a lunatic, recently met with a decided check at the hands of the Master of the Rolls and two of the Lord Justices in Lunacy. The point raised in the case (*In re Charles Clarke*, 1898, W. N. p. 23) was whether a creditor who had obtained possession of the property of a lunatic debtor under a writ of *fi. fa.* could have the exercise of his legal rights arrested by an order in lunacy made after, but on a summons taken out before, the sheriff had seized the lunatic's goods. The Court held unhesitatingly, and in strict accordance with a long series of precedents, ranging from the time of Lord Eldon downwards, that this question must be answered in the negative. The jurisdiction of the Court in Lunacy to delay or defeat the rights of creditors is, and has always been, strictly limited by what is necessary in the interests of the lunatic. It is not necessary for the protection of the lunatic that the power claimed in *In re Charles Clarke* should exist; for nothing is easier than to obtain a summary order for an injunction, or for the appointment of an interim receiver in lunacy in urgent cases. Shortly stated, the legal points involved in the case were these: while the issue of a summons in lunacy gives the Master or the judge *jurisdiction to make an order*, the power of the Court over a lunatic's property does not attach *till some order has been made* bringing that property under the control and protection of the lunacy jurisdiction. Again, sec. 117 of the Lunacy Act of 1890 does not extend the power of the Court of Lunacy in this respect. In the last place, the distinction should be noted between *In re Charles Clarke* and *In re Winkle*, [1894] 2 Ch. 519. It consists in the fact that in the latter case the receiver in lunacy was, while in the former case he was not, in possession of the goods at the critical period.

(*f*) *Amount of Income.*—No comment is needed on this head.

(*g*) *Past Maintenance.*—As to when an obligation to pay for, will be implied, see *ante*, p. 48; and add to authorities there cited, *In re Newbegin's Estate*, 1887, 36 Ch. D. 477.

(*h*) *Future Maintenance.*—As to the postponement of debts to maintenance, *vide supra*, p. 65. The "comfort" (a term which receives a very generous interpretation (cp. *In re Persse*, 1828, 3 Mol. 94), even if the claims of creditors (*vide supra*, p. 65), or next-of-kin, or expectants (*Ex parte Baker*, 1801, 6 Ves. 7) suffer in consequence) of the lunatic is the primary consideration in determining the amount of the allowance—for the increase or reduction of which, provision is made; and the allowance may be made to include payments to relatives, whom the lunatic is bound to support (a rule derived by implication from the Statute *De Prærogativâ Regis*), and even payments in settlement of moral obligations arising from family claims (cp. *In re Darling*, 1888, 39 Ch. D. at p. 212), claims arising from service (cp. *In re Carysfort*, 1840, Cr. and Ph. 76), and charitable claims (cp. *In re Frost*, 1870, L. R. 5 Ch. 701).

V. SUPERSEDEAS.—There are three forms of supersedeas. (1) *Conditional*, *i.e.* the supersedeas of a commission on certain terms and conditions (L. A., 1890, s. 105). (2) *Partial*, *i.e.* the rescission or variation of the commission as regards the commitment of the person (L. A. s. 106 (1)); and (3) *Absolute*, the main ground for which is now the lunatic's recovery. The application for absolute supersedeas is made by petition (which should be in the name of the person alleged to have recovered his soundness of mind, though it seems (*Ex parte Bampton*, 1728, Mos. Ch. 78) that the committee's may be joined), supported by affidavits. The appearance of the lunatic at the hearing is necessary, unless he is labouring under some physical infirmity rendering it impossible, in which case he would be examined by one of the Chancery Visitors, or (*semble*) unless the question of his sanity had been determined by a competent tribunal abroad (cp. *In re Dyce Sombre*, 1844, 1 Ph. Ch. at pp. 437, 438). To justify a supersedeas there must be evidence of restored competence on the part of the lunatic to manage himself and his affairs (cp. *Ex parte Holyland*, 1792, 3 Bro. C. C. at p. 443). The judge may, if he think fit, direct an issue as to sanity, or suspend the proceedings under the commission temporarily, or (L. A., 1890, s. 106 (2)) annex terms to the supersedeas.

MISCELLANEOUS.—It only remains to give an alphabetical summary—which does not profess to be exhaustive—of a number of miscellaneous additional heads of law with which the law of lunacy comes into contact, and to indicate the sources of information in regard to them.

ACTIONS.—(*a*) *By and against lunatics* (see *ante*, pp. 49, 50; NEXT FRIEND; GUARDIAN AD LITEM). (*b*) *To perpetuate testimony* (see *Smith* v. *A.-G.*, 1777, *cit.* 1 Vern. 105; *In re Stoer*, 1884, 9 P. D. 120).

ADVOWSON.—Neither the lunatic nor his committee can present (Com. *Dig.* "Idiot," C). The right of presentation is in the Lord Chancellor. As to sale of, see *In re Vavasour*, 1851, 3 Mac. & G. 375.

ALIENATION (UNDER FINES AND RECOVERIES ACT).—As to where concurrence of lunatic husband dispensed with, see sec. 91 of 3 & 4 Will. IV. c. 74, and Wood Renton on *Lunacy*, pp. 30, 31.

ALIMONY.—The wife *de facto*, in suit for nullity, entitled to alimony (*Portsmouth* v. *Portsmouth*, 1826, 3 Add. 63), which is not alienable (*In re Robinson*, 1884, 27 Ch. D. 160).

APPRENTICESHIP.—Probably dissoluble on ground of insanity on same principles as partnership. See PARTNERSHIP.

ARBITRATION.—See vol. i. pp. 300, 301.

ARCHBISHOP, LUNACY OF.—See vol. ii. p. 158.

ARMY.—See Army Act, 1881 (44 & 45 Vict. c. 58), ss. 90, 130; Army (Annual) Act, 1889, s. 5; Army (Annual) Act, 1891, s. 6; Army (Annual) Act, 1894, s. 5.

ATTORNEY, POWERS OF.—As to position of lunatic in regard to, see *Antrim* v. *Bucks*, 14 & 15 Car. II. C. C. 17; *Bayley* v. *Warburton*, 8 Geo. II. Com. Rep. 494, etc.

BANKRUPTCY.—As to whether lunatic can be adjudicated, see vol. i. 491. The question still remains open.

BISHOP, LUNACY OF.—See vol. ii. p. 158.

CHARITY, Lunatic cannot be visitor of (cp. *A.-G.* v. *Dixie*, 1807, 13 Ves. 533; and *Floyds* or *Floods* or *Jesus College* case, *cit.* Tyssen, *Charities*, 33, and Hob. 136).

COMPANY, Idiot or lunatic cannot be liquidator of (*In re North Molton Mining Co.*, 1886, 34 W. R. 527). A lunatic shareholder may vote by his committee (8 & 9 Vict. c. 16, s. 79).

DOMICILE.—See vol. iv. 343.

EXECUTORS AND ADMINISTRATORS.—See vol. v. 186; Pope on *Lunacy*, 2nd ed.; Wood Renton on *Lunacy*, p. 1081).

FRIENDLY SOCIETIES.—As to whether lunacy is "sickness" within rules of, see *Burton* v. *Eyden*, 1873, L. R. 8 Q. B. 295; *Caistor Union* v. *Cleaver*, 1892, 56 J. P. 503). See also, as to members of, becoming lunatic and chargeable to poor-rate, case noted in *Law Journal*, 20th March 1897.

GUARDIAN, Idiot or lunatic cannot be (*Co. Lit.* 886; *Ex parte Brydges*, 1791, 2 Fonbl. Eq. 249 (*a*)). As to consent to marriage where guardian or parent lunatic, see 4 Geo. IV. c. 76, s. 17; *Ex parte Reibey*, 1843, 7 Jur. 589.

GUARDIAN AD LITEM.—See *supra*, ACTIONS (*a*), and article GUARDIAN AD LITEM.

HUSBAND AND WIFE.—Supervening insanity does not prevent the usual incidents of marriage from arising (see Bac. *Abr.* tit. "Idiots and Lunatics" (D); *Co. Lit.* 30 (*b*) (dower and curtesy); *Brodie* v. *Barry*, 1812, 2 Ves. & Bea. at p. 39 (maintenance); *In re Dixon's Trs.*, 1879, 48 L. J. Ch. 572 (equity to a settlement), etc. etc.). See ALIENATION, *supra*.

INCUMBENT.—See article INCUMBENT, and Incumbents Resignation Act, 1871. *Semble*, proceedings under that statute need to be taken by inquisition.

INSURANCE, LIFE.—Capacity of insane to insure depends on ordinary law as to their capacity to contract (*vide supra*, p. 47). Insanity is a fact to be disclosed on insurance (cp. *Lindenau* v. *Desborough*, 1830, 3 M. & R. 45; but see *Sweete* v. *Fairlie*, 1833, Shelf. *Lun.* 532. See also, as to suicide (while insane) and life insurance, articles COMMIT SUICIDE; and LIFE INSURANCE, *ante*, vol. vii. p. 439).

JUDGE.—As to lunacy of, see Wood Renton on *Lunacy*, p. 790; also Bryd. 65, 85; Brooke, *Abr.* 258 (*a*); *Mirr. Just.* c. 2, s. 2.

LEGACIES.—*Ademption.*—The surplus of specific property disposed of within sec. 123, L. A., 1890, retains its character for purposes of succession (cp. *Freeman* v. *Ellis*, 1863, 1 H. & M. 758); a specific bequest made by lunatic, while sane, will, if possible, not be defeated (cp. *Ex parte Haycock*, 1828, 5 Russ. 154; 29 R. R. 16; *Taylor* v. *Taylor*, 1853, 10 Hare, 475; *In re Larking*, 1887, 37 Ch. D. 310). In other cases a change in the character of specific property belonging to a lunatic adeems a legacy of (cp. *Browne* v. *Groombridge*, 1869, 4 Madd. 495; 20 R. R. 326; see also *In re Wood*, [1894] 2 Ch. 577). *Payments.*—See as to, *Winthrop* v. *Winthrop*, 1845, 1 Coop. *t.* Cott. 196; *In re Upfull*, 1851, 3 Mac. & G. 281; Theobald on *Wills*, 4th ed., 396, 405.

LIBEL.—As to responsibility of lunatic for, see TORT, *infra*. As to whether imputation of insanity is a libel, see *Morgan* v. *Lingen*, 1863, 8 L. T. 800; *Weldon* v. *Winslow*, 1884, *Times*, March 14–19, 1884; *Weldon* v. *De Bathe*, 1885, 33 W. R. 328.

LIMITATION.—See article LIMITATION.

MASTER AND SERVANT.—See APPRENTICESHIP, *supra*. *Semble*, the absence of a servant from insanity does not operate as a dissolution of the contract of service (see *Anon.*, 35 Car. II. Skin. 114; *R.* v. *Charles*, 1772, Burr. S. C. 706; *R.* v. *Sutton*, 1794, 5 T. R. 660; *R.* v. *Hulcott*, 1796, 6 T. R. 583).

MORTGAGE.—See *ante*, p. 63.—It should be noted that, under sec. 117, L. A., 1890, (1) the jurisdiction is now exercisable by the "judge" (see s. 108, and *ante*, p. 54); (2) it extends to any "property" (for definition, see sec. 341, L. A., 1890); (3) the mortgage may be ordered not only for payment of lunatic's debts, but for his "benefit" generally; (4) the jurisdiction applies to cases under L. A., 1890, s. 116 (as to which see *ante*, p. 60). For the practice, see R. L., 1892, rr. 19, 48, 49, 50, 123; and consult the following cases: *In re Townshend*, 1865, 2 De G., J. & S. 519; *In re Fox*, 1886, 33 Ch. D. 37; *In re Pugh*, 1853, 3 De G., M. & G. 416; *In re Stables*, 1864, 4 De G., J. & S. 257; *Ex parte*

Phillips, 1812, 19 Ves. 118; 12 R. R. 151. For forms of reconveyance on behalf of lunatic mortgagee and charge on lunatic's real estate, see Wood Renton on *Lunacy*, pp. 1061, 1062.

NEXT FRIEND.—See ACTIONS (*a*), *supra*, and articles GUARDIAN AD LITEM; NEXT FRIEND.

PARLIAMENT.—See article FRANCHISE (ELECTORAL), vol. v. p. 479; and Lunacy (Vacating of Seats) Act, 1886.

PARTNERSHIP.—The capacity of an insane person to become a partner depends on considerations similar to those which determine his capacity to contract (see *ante*, p. 47). Supervening insanity does not *ipso facto* dissolve a partnership, unless the articles contain a provision to that effect (cp. *Wrexham* v. *Huddleston*, 1734, 1 Swans. 514–518; *Sayer* v. *Bennet*, 1784, 1 Cox, 107; *Waters* v. *Taylor*, 1813, 2 Ves. & Bea., per Lord Eldon, L.C., at p. 303; *Jones* v. *Noy*, 1833, 2 Myl. & K. 125). But a dissolution may be obtained by judicial order (*a*) under sec. 35 (*a*) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), where a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind; and (*b*) under sec. 119 of the L. A., 1890, where a person *being* a member of a partnership becomes lunatic. The differences between these sections appear to be that only cases of supervening lunacy can be dealt with under (*b*); that there is no express restriction in (*b*) of the right of the Court to intervene in cases where the lunatic is so found, or permanent unsoundness of mind can be shown (it is unlikely, however, that anything short of permanent unsoundness would be held practically, even if it were legally, sufficient); that (*b*) is applicable (*semble*) only where the proceedings are not contentious, and no question of the taking of disputed accounts is involved; that it is, however, applicable to cases falling short of positive unsoundness of mind (*e.g.*, coming under L. A., 1890, s. 116, subs. (1) (*d*)); and that the judge's discretion is to be exercised for the benefit of the lunatic and his family (*ibid.* subs. (4)). As to evidence necessary to prove permanent unsoundness of mind, see *Jones* v. *Lloyd*, 1874, L. R. 18 Eq. at p. 272; *Waters* v. *Taylor*, *ubi supra*; *Pearce* v. *Chamberlain*, 1750, 2 Ves. 35; *Kirby* v. *Carr*, 1838, 3 Y. & C. 184; *Sadler* v. *Lee*, 1843, 6 Beav. 324; *Anon.*, 1855, 2 Kay & J. 441; *Helmore* v. *Smith*, 1887, 35 Ch. D. 442; *Jones* v. *Noy*, *ubi supra*; *Rowlands* v. *Evans* and *Williams* v. *Evans*, 1861, 30 Beav. 302. See also *Light* v. *Light*, 1858, 25 Beav. 248; *Fisher* v. *Melles*, 1870, cit. L. R. 18 Eq. at p. 268; *Dibbins* v. *Dibbins*, 1896, 44 W. R. 595. The date of dissolution is (*a*) in the case of a partnership at will, the time fixed by notice of dissolution duly given, or, if no notice is provided for, from the time of proceedings for dissolution being taken (*Kirby* v. *Carr*, *ubi supra*; cp. Partnership Act, 1890, s. 32, and *Mellersh* v. *Keen*, 1859, 27 Beav. 236); (*b*) in the case of a partnership not at will, where the articles authorise a dissolution, the date at which the partnership was so dissolved (*Robertson* v. *Lockie*, 1846, 15 Sim. 285); (*c*) in all other cases the date of the decree (*Besch* v. *Frolich*, 1842, 1 Ph. Ch. 172). Costs of dissolution paid out of partnership assets (*Jones* v. *Welch*, 1855, 1 Kay & J. 765). Insane partner has right to restoration on recovery (see *Anon.*, *ubi supra*, and cp. *J.* v. *S.*, [1894] 3 Ch. 72). As to service of writs on lunatic partners, see R. S. C. 1883, Order 9, r. 5; and for form of judgment in action against partner, Seton, *Decrees*, 5th ed., p. 1814.

PRESCRIPTION.—See articles LIMITATION; PRESCRIPTION.

PRESUMPTIONS.—As to (1) *continuance of insanity*, see *Grimani* v. *Draper*, 1848, 6 N. C. 421; *Johnson* v. *Blane*, 1848, *ibid.* 457; *Fowlis* v. *Davidson*, 1848, *ibid.* 473; (2) *sanity*, *ante*, p. 52.

PRINCIPAL AND AGENT.—See article PRINCIPAL AND AGENT; and *ante*, p. 48, as to agency of wife.

RAPE.—See vol. i. p. 388.

RATING.—See article ASYLUMS, vol. i. p. 389.

SHIP.—As to lunatic owner of or shareholder in, see M. S. A. 1894, s. 55, and cp. *Michael* v. *Fripp*, 1868, L. R. 7 Eq. 95 (infancy).

TORT.—The question of the liability of a lunatic for tort is still undetermined. See Pollock on *Torts*, 5th ed., p. 51; Clerk and Lindsell on *Torts*, 2nd ed., pp. 39, 40; Wood Renton on *Lunacy*, 65; and *L. Q. R.* July 1897.

TRUSTS.—As to exercise of powers vested in lunatic as trustee, see *ante*, p. 64. See also TRUSTS; VESTING ORDER. For notes on the practice, see Wood Renton on *Lunacy*, pp. 989, 990.

VESTING ORDERS.—See VESTING ORDER.

WITNESS.—A lunatic is *competent* to give evidence, either *vivâ voce* or upon affidavit, if the judge is satisfied, on a preliminary examination, that he understands the nature and obligation of an oath (cp. *R.* v. *Hill*, 1851, 2 Den. C. C. 254; *Spittle* v. *Walton*, 1871, L. R. 11 Eq. 420). The *credibility* of such testimony is a question for the jury. See also article ASYLUMS, vol. i. 392.

[*Authorities.*—Among the *older* text-books, see Bridal, 1700; Collinson (a work of great value), 1812; Shelford, 1847; Phillips, 1858. The chief *modern* text-books are: Pope, 2nd ed., 1890; Archbold, 4th ed., 1895; Elmer, 7th ed., 1892; Wood Renton, 1896; Fry, 3rd ed., 1890; Pitt-Lewis, *Insane and the Law*, 1895.]

Lying about.—Cattle may be "lying about" a highway within the meaning of 27 & 28 Vict. c. 101, s. 25, although there may be a keeper with them (*Lawrence* v. *King*, 1868, L. R. 3 Q. B. 345).

Lying by.—See ACQUIESCENCE.

Lying in Franchise.—Rights and privileges enjoyed by a subject under a grant from the Crown, or prescription implying a grant, of its prerogative rights, are said to lie in franchise. Such are rights of free warren (*q.v.*), and the rights to seize waifs (*q.v.*), estrays (*q.v.*), and wrecks (*q.v.*) without the aid of a Court. The right of seizure does not bar the remedy by action, but is in addition to it (3 Stephen, *Com.*, 11th ed., p. 275; Elton, *Copyholds*, 2nd ed., p. 11).

Lying in Grant and in Livery.—See CORPOREAL HEREDITAMENTS; INCORPOREAL HEREDITAMENTS; GRANT.

Lyndhurst's (Lord) Act.—See MARRIAGE; PROHIBITED DEGREES.

Lyons Inn.—See INNS OF COURT.

Mace—An ornamental staff borne before magistrates and certain other official persons, *e.g.* the Speaker of the House of Commons, as a symbol of authority. The Speaker's mace lies on the table of the House of Commons while the Speaker is in the chair, and is placed under the table when the House goes into committee. See HOUSE OF COMMONS; SERGEANT-AT-ARMS; SPEAKER.

Machinery.—See BILLS OF SALE, vol. ii. p. 128; FIXTURES, vol. v. p. 385; see also EMPLOYERS' LIABILITY, vol. v. p. 5; FACTORIES AND WORKSHOPS, *passim*; RIOT.

Madagascar—An island in the Indian Ocean, in which British consular Courts have been established by agreement with the native authorities. Under the Order in Council of 15th October 1889, and instructions issued in accordance therewith, appeals from Madagascar are taken to the Supreme Court of Mauritius, and thence to the Queen in Council. By a declaration signed 5th August 1890, the British Government recognised the French protectorate over the island, but it was stipulated that the rights and immunities enjoyed by British subjects should not be affected.

[*Authorities.*—Hertslet's *Treaties*, vol. xviii. pp. 1 and 437. As to lands held by British subjects, see Hertslet, xv. 1029.]

Made.—A receiving order is "made" on the day it is pronounced, not when it is drawn up (*In re Manning*, 1885, 30 Ch. D. 480).

A poor rate is not "made" during the qualifying twelve months, within the meaning of sec. 3 of the Representation of the People Act, 1867, unless it has been signed by the parish officers and allowed by the justices during those twelve months (*Jones* v. *Bubb*, 1868, L. R. 4 C. P. 468). See Stroud, *Jud. Dict.*

Madhouse; Madman; Madness. — See ASYLUMS; IDIOT; LUNACY; MEDICAL JURISPRUDENCE.

Magic.—See FORTUNE TELLING, vol. v. p. 468; WITCHCRAFT.

Magistrate.—This term is occasionally applied to the principal officers of municipal corporations in England, as it is commonly in Scotland. But the mayor and aldermen of London are the only persons who are justices by charter to whom the term is appropriate. It is also applied to justices of the peace; but is now most commonly used with reference to persons appointed from the legal profession as paid magistrates for the purpose of the Indictable Offences Act, 1848, and the SUMMARY JURISDICTION ACTS.

The local authority must provide out of the local improvement rate a proper police court or office (1863, c. 97, s. 4).

This Act does not extend to boroughs, but only to non-municipal areas, corresponding to urban districts, or rural districts to which urban powers have been given by the Public Health Act, 1875, or the Local Government Act, 1894, and the authority is now the district council (c. 50, s. 161).

The Municipal Corporations Act, 1882, empowers the corporation of any municipal borough (except the City of London) to petition a Secretary of State to appoint one or more stipendiary magistrates for the borough from barristers of not less than seven years' standing. Such magistrate holds office during Her Majesty's pleasure, and receives a salary, paid quarterly, not exceeding, except with the consent of the borough council, that specified in the petition. Such magistrates, whether appointed for a borough or other district or county in which the district is, are *virtute officii* justices of the borough, and when sitting in a police court have the power of two unpaid justices (1848, c. 42, s. 29; c. 43, s. 33; 1858, c. 73, ss. 1–3; 1879, c. 43, s. 20). But they cannot act at Quarter Sessions or a Court of

gaol delivery (1858, c. 73, s. 3; 1863, c. 97, s. 5; 1882, c. 50, s. 163), and have no jurisdiction as to matters expressly required to be done at special sessions, except as to the grant or confirmation of a licence, for which a magistrate may sit as one of the justices (1874, c. 94, s. 39). This does not apply in a district assigned to a Metropolitan Police Court. They can act in certifying lunatics under sec. 9 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

As to stipendiary magistrates in the Metropolis, see METROPOLITAN POLICE DISTRICT. Stipendiary magistrates are appointed under particular Acts for the Staffordshire Potteries (2 & 3 Vict. c. 15; 58 & 59 Vict. c. 107), Manchester and Salford (7 & 8 Vict. c. 30), Wolverhampton (9 & 10 Vict. c. 65), and Chatham and Sheerness (30 & 31 Vict. c. 63). Under the Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), power is given to the local authority of certain cities and places which are not municipal boroughs, and are not included in a district already having a stipendiary magistrate under statute, to pass a resolution by a two-thirds majority that it is expedient to appoint a stipendiary magistrate, and to fix his salary, subject to approval by a Secretary of State. On this being done, the Queen may appoint during pleasure, as police magistrate, a barrister of not less than five years' standing. He need not be qualified by estate. He can appoint as his clerk a solicitor at his pleasure (1863, c. 97, s. 6; 1881, c. 43). His warrants can be executed at any distance within seven miles of the place for which he is appointed (1863, c. 97, s. 5). See Wright, *Office of Magistrate*, 3rd ed., 1898.

Magna Carta.—The circumstances leading up to the acceptance of the terms of the barons, and the promulgation of these in Magna Carta, need not be dealt with here. They belong to the region of the history of constitutional law. The statute was originally promulgated in 1215, was reissued in 1216 and 1217, and in the shape which it finally took in 1225. Since that date it has been confirmed thirty-four times, the last monarch who thus expressly recognised it being Henry VI. The charter is, says Coke, declaratory of the common law; but this is not quite accurate, for in many respects it altered the law. The statute, as originally accepted by the king, consisted of a preamble and sixty-three clauses. The chief of these may be conveniently grouped as follows:—

1. *Clauses restraining Arbitrary Imprisonment.*—"No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers or by the law of the land" (clause 39). "The writ of inquest of life or limb [*i.e.* the writ whereby a person imprisoned on a charge of homicide could be released on bail] shall be given gratis, and shall not be denied" (clause 36).

2. *Clauses relating to the Administration of Justice.*—Clause 40 is the most important in this group. It runs thus: "To none will we sell, to none will we deny or delay right or justice" (clause 40). Other provisions of far-reaching effect are: (*a*) those providing that amercements shall be proportional to the offence which they are designed to punish, and shall be determined by the judgment of the accused's peers (clauses 20, 21, 22, 39); (*b*) that the common pleas shall not follow the King's Court, but shall be held in one fixed place (clause 17); (*c*) the provision for the trial of actions relating to the property in land by justices of assize, who are to visit the counties for this purpose four times (*temp.* Henry III. reduced

to once) a year (clauses 18, 19); (*d*) the disqualification of sheriffs, constables, coroners, and bailiffs to hold pleas of the Crown (clause 24).

3. *Clauses limiting Arbitrary Taxation or Exactions.*—The original edition of Magna Carta contained clauses providing that no scutage or extraordinary aid should be imposed, unless *per commune concilium regni*, consisting of the archbishops, bishops, earls, and greater barons summoned individually by writ, and of the other tenants *in capite* summoned generally by writ addressed to the sheriff of each shire. It was also provided that ordinary aids should be of a reasonable amount. These clauses did not appear in the reissues of the charter under Henry III., but clauses 28–31, aimed against the prerogative of purveyance, were not revoked. In addition to the above there are clauses which limit arbitrary exactions under colour of demanding the due observances of feudal obligations. The charter of John protected tenants *in capite* and mesne tenants alike. Under Henry III. the concessions to the latter were modified for the worse.

In addition to the clauses grouped under the above headings there are many others which but for space limits might be mentioned. Suffice it to point out three of special interest. Clause 1 provides that the English Church (*Anglicana ecclesia*) shall be free, and shall have its rights untouched and its liberties inviolate (see further, articles CHURCH OF ENGLAND; ROYAL SUPREMACY; SUBMISSION OF THE CLERGY). Clause 41 gives even foreign merchants the right to enter, dwell in, and leave England for the purposes of buying and selling without subjection to evil tolls (*sine malis toltis*), save that in time of war a system of reciprocity is to be carried out. It is remarkable to find so early as 1215 a recognition of the commercial policy still followed by British Governments. Clause 61 provides a means of enforcing the observance of the charter on the king. He agreed if he should break any of its provisions, and on complaint of a committee of the barons should fail to give instant redress, that the barons might break out into rebellion and distrain on his lands and possessions. This clause disappeared under Henry III. There were many alterations and additions to the charter made under Henry III.; one of the most important of the latter being a clause aimed at preventing the fraudulent gift of lands in mortmain.

Maihem.—See MAYHEM.

Maiming.—(1) Human beings. See MAYHEM.
(2) Cattle. See MALICIOUS DAMAGE.

Mainpernor.—See MAINPRISE.

Mainprise.—Under the common law where the sheriff arrested a man, unless his prisoner was accused of an offence not bailable or repleviable, he had authority to allow him to be bailed or replevied (*replegiatus*), or to be mainprised (*manu captus*), *i.e.* to set him free as soon as sureties (*plegii*) undertook (*manu caperunt*) to produce him in Court at the appointed time. When he did not do this, liberty could be obtained by the writ *de odio et atiâ*, or the writ *de homine replegiando*. The persons who undertook were called mainpernors. Their liabilities and rights are

said to differ from those of bail in that they had not the custody of the man released, and could not seize him and surrender him to justice, and that they were bound by no recognisance to the Crown, but were liable to amercement if the released man did not appear in accordance with their undertaking.

Mainprise is wholly obsolete, but its nature has been recently considered in *In re Nottingham Corporation*, [1897] 2 Q. B. 502, where an unsuccessful attempt was made to identify it with bail, and is dealt with historically in Pollock and Maitland, *Hist. Eng. Law*, vol. ii. pp. 582–588; and see BAIL, vol. i. p. 443.

Main Road.—See HIGHWAYS.

Maintenance.—1. *What is Maintenance?*—In Bacon's *Abridgment* (*s.v.*), the subject is divided into three heads:—(1) Champerty (*ante*, vol. ii. p. 432); (2) "where one laboureth a jury, which is called EMBRACERY"; and (3) "where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of maintenance." This article is confined to a consideration of the third class. The early text-writers considered even the most trifling interference in a suit by a stranger, unless warranted by some recognised excuse, as forbidden by law. Coke says: "Maintenance is an unlawful upholding of the demandant or plaintiff, tenant or defendant in a cause depending in suit, by word, writing, countenance, or deed" (2 *Inst.* 212); and Blackstone (iv. p. 134) defines the offence as "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money, or otherwise to prosecute or defend it" (see also *Termes de la Ley* (*s.v.*), and the Abridgments). In the few modern cases where maintenance has arisen apart from champerty, the assistance given has always taken the form of providing money to enable one litigant to fight; and it may be safely said that no Court would now hold it to be maintenance for a friend to stand beside a litigant at the bar (Bac. *Abr.* "Maintenance" (A.)), or to volunteer evidence (per Buller, J., in *Master* v. *Miller*, 1791, 4 T. R. at p. 340; see numerous other cases suggested in Hawk., P. C. (bk. i. ch. 83)), or for counsel to argue without a fee (Bac. *Abr.* B. 5). "That such doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside must be expected" (per Buller, J., *l.c.*). It may, however, be maintenance for a solicitor to indemnify his client against the costs (*In re Masters*, 1835, 1 H. & W. 348; *Hilton* v. *Woods*, 1867, L. R. 4 Eq. 432—both cases of champerty). An agreement with a publisher, in consideration of his publishing a libel, to defend any action against him arising out of it, is maintenous (*Shackel* v. *Rosier*, 1836, 2 Bing. N. C. 634).

The sale of information which may enable a party to recover property is not necessarily maintenance (*Sprye* v. *Porter*, 1856, 7 El. & Bl. 58, *ante*, vol. ii. p. 433). As to advertising for evidence, see *Plating Co.* v. *Farquharson*, 1881, 17 Ch. D. 49. Nor is the purchase of a share in order to obtain a *locus standi* to object to some proceeding of the company (*Hare* v. *L. & N.-W. Rwy. Co.*, 1860, John. 722), or the purchase of a legacy which can only be recovered by means of an administration action (*Tyson* v. *Jackson*, 1860, 30 Beav. 384).

Procuring a plaintiff to sue is not, without more, maintenance (*Flight* v.

Leman, 1843, 4. Q. B. 883), although it is, if malicious, an actionable wrong (*l.c.*, but *quære* as to this).

It has been said that an immoral motive is essential to maintenance (*Fischer* v. *Kamala Naicker*, 1860, 8 Moo. Ind. App. at p. 187). The contrary was decided in *Bradlaugh* v. *Newdegate* (*infra*).

The offence may be committed after judgment in the suit (Hawk., P. C. bk. i. ch. 83).

An agreement which is illegal according to English law on the ground of maintenance cannot be enforced here, although made in a country where the objection did not exist (*Grell* v. *Levey*, 1864, 16 C. B. N. S. 73). In *Metropolitan Bank* v. *Pooley* (1885, 10 App. Cas. 210), Lord Selborne expressed an opinion that a corporation cannot be guilty of maintenance; but see the cases cited in Buckley's *Companies Act*, 6th ed., pp. 104, 494.

2. *Excuses.*—Common interest between the maintainor and the litigant in "the thing in variance" in the suit (Hawk., P. C. bk. i. ch. 83), a personal relationship between them, and the inducement of a charitable motive are recognised excuses. "If it is open to go beyond exceptions already specifically allowed, I should adopt the rule indicated by Lord Coleridge in *Bradlaugh* v. *Newdegate*, that in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present or contingent or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest which arises from the connection of the parties, as master and servant, or that which charity or compassion gives a man in behalf of a poor man, who, but for the aid of his rich helper, could not assert his right" (per Lord Esher, M. R., in *Alabaster* v. *Harness*, [1893] 1 Q. B. at p. 343).

The common interest may be a reasonable belief that the suit of the party maintained involves the determination of an issue in a similar suit against the maintainor himself (*Findon* v. *Parker*, 1843, 11 Mee. & W. 675), or a question affecting the common trade of both (*Plating Co.* v. *Farquharson*, 1881, 17 Ch. D. 49; see also Vin. *Abr.* "Maintenance" (G.)). It must be some legal, as distinguished from a merely sentimental, interest, and an interest in the incidental questions arising in the suit maintained is not sufficient (*Alabaster* v. *Harness*, *supra*). So in the case last cited the defendant was not excused for supplying funds to carry on a libel action brought against the plaintiff by one who had puffed the defendant's goods, on the ground that the truth of the statements as to his goods came into question. Further, the maintainor must have some special interest other than that of the public at large, or of a large section of the public. A mere member of the public is not entitled to maintain an election petition (*Wallis* v. *Duke of Portland*, 1797, 3 Ves. 494; Bro. P. C. Supp. 161), nor a member of Parliament to maintain an action by a stranger against another member for voting without having taken the oath (*Bradlaugh* v. *Newdegate*, 1883, 11 Q. B. D. 1).

The excuse of relationship is extended to master, servant, heir, brother, son-in-law, brother-in-law, fellow-commoner, and landlord (*l.c.* p. 11, and see Vin. *Abr.* "Maintenance" (H.)). An Irish Court has held that a first cousin is not excused for maintaining his relative's suit (*Burke* v. *Green*, 1814, 2 B. & B. 517). Some of the older authorities put this as, in fact, an instance of the first excuse. Thus it was said that a master might defend his servant in an action in which the servant might be sent to prison, and thus the master lose his services, but not in a real action (Bac. *Abr.* "Main-

tenance" (B.)). Other authorities (*e.g.* Blackstone, iv. p. 134) state the excuse absolutely. In view of the wide construction put upon the next excuse, the difference is now immaterial.

If the maintenance is due to charity, even though the charity be an inconsiderate kindness done to the suitor aided without regard to the injury done to the plaintiff, and without any inquiry as to the reasonableness of the suitor's claims, it is excused (*Harris* v. *Brisco*, 1886, 17 Q. B. D. 504).

3. *Consequences of Maintenance.*—A maintenous agreement is illegal and, therefore, void (see *Findon* v. *Parker*, *Grell* v. *Levey*, and *Shackel* v. *Rosier*, *supra*, and CHAMPERTY). The objection must formerly have been pleaded (*Fischer* v. *Kamala Naicker*, *supra*). It cannot be raised by a purchaser in respect of a step in the vendor's title (*Knight* v. *Bower*, 1858, 27 L. J. Ch. 520).

Maintenance is an actionable wrong for which the party injured may recover damages. It appears that the plaintiff's costs of the suit maintained as between solicitor and client were recovered in *Bradlaugh* v. *Newdegate* (*supra*). It is submitted, however, that the ordinary rule by which the costs are limited to those between party and party applies (see *Harris* v. *Brisco*, *supra*; Mayne on *Damages*, 5th ed., p. 448; *Lotterell* v. *Jones*, 1851, 11 C. B. 713; *Cockburn* v. *Edwards*, 1881, 18 Ch. D. 449; *Grace* v. *Morgan*, 1836, 2 Bing. N. C. 534).

It is also a misdemeanour punishable by several early statutes (in *Metropolitan Bank* v. *Pooley*, 1885, 10 App. Cas. 210, Lord Selborne suggested that it was founded upon these statutes; but see Vin. *Abr. s.v.* (D.)), some of which are still in force (1 Edw. III. c. 14; 1 Rich. II. c. 4; 7 Rich. II. c. 15). A penal action lies to recover £10 under 32 Hen. VIII. c. 9, s. 3 (s. 2 has been repealed by the Land Transfer Act, 1897).

[*Authorities.*—The principal authorities are cited above.]

Maintenance of Infant.—See ADVANCEMENT; INFANTS.

Majesty—A title of honour given to emperors and kings. For many centuries this title was claimed as exclusively belonging to the Emperors of the Holy Roman Empire; in 1633 it was conceded by the Imperial Chancery to the kings of England and Sweden, and in 1641 to the king of France. Much earlier than this, however, the title was used by the sovereigns both of England and France. It is frequently said that Henry VIII. was the first English sovereign to be styled "Your Majesty"; but although it would seem that the title came into more general use during his reign, it was in fact employed by some of his predecessors on the throne. See EXCELLENCY; HIGHNESS; SOVEREIGN.

[*Authorities.*—Selden, *Titles of Honour*, 3rd ed., ch. viii.; Bryce, *Holy Roman Empire*, 8th ed., 238.]

Major.—See MAJORITY; OFFICERS.

Majority.—A person attains his or her majority at the age of twenty-one, which age is completed on the day preceding the anniversary of the person's birth (1 Black. *Com.* 463). "If A. be born on the third day

of September, and on the second day of September twenty-one years afterwards he makes his will, this is a good will; for the law will make no fraction of a day, and by consequence he was of age" (per Holt, C.J., in *Sir Robert Howard's* case, 1700, 2 Salk. 625).

As meaning the office and rank of a major, see OFFICERS.

Make.—See DO OR MAKE; MADE.

Make Good.—To "make good" damage to property means to restore things to the condition in which they were before (per Cockburn, C.J., in *Crofts* v. *Haldane*, 1867, 36 L. J. Q. B. 85, 88).

Maker.—Maker of a promissory note, see PROMISSORY NOTE.

Malacca.—See STRAITS SETTLEMENTS.

Mala in se—Acts bad or wrong in themselves. Acts are said to be *mala in se* which are contrary to the law of nature or rules of morality; such, for example, are murder, larceny, and other crimes. See MALA QUIA PROHIBITA.

Mala praxis.—See MEDICAL JURISPRUDENCE.

Mala quia prohibita—Acts wrongful because prohibited by human laws; such acts are not necessarily wrongful in themselves, or *mala in se* (*q.v.*), but have been rendered so by positive law. Under numerous statutes various acts are forbidden, and the doing of them is punishable, which, however, are not criminal in themselves; these are prohibited acts (*mala quia prohibita*).

Male.—"In order to entitle a person to *inherit* by the description of heir-male or heir-female of the body, it is essential not only that the claimant be of the prescribed sex, but that such person trace his or her descent entirely through the male or female line, as the case may be. Thus it is laid down by Littleton (s. 24) that 'if lands be given to a man and the heirs-male of his body, and he hath issue a daughter, who has issue a son, and dieth, and after the donee die, in this case the son of the daughter shall not inherit by force of the entail; for whoever shall inherit by force of a gift made to the heirs-male ought to convey *his descent wholly by heirs-male.*' It is otherwise, however, in the case of gifts to the heir male or female by *purchase*" (2 Jarman, *Wills*, 5th ed., p. 912). See, however, *Lywood* v. *Kimber*, 1860, 29 Beav. 38, where it was held that in a bequest to A. for life, and upon his death "unto and among his issue male," with a gift over, on the death of A. "without leaving issue male," the issue male claiming through males were alone entitled. See MALE LINE.

Male Children; Male Descendants.—In *Bernal* v. *Bernal*, 1838, 7 L. J. Ch. 115, the words "male children" were read "male descendants," and it was held that only male descendants claiming through males were entitled to take under the provisions of the will.

Male Line; Male Lineal.—"The phrase '*linea masculina*' properly means a line commencing with a male and continued through males" (per Lord Selborne, in *D'Amico* v. *Trigona*, 1888, 13 App. Cas. 815). "'Male lineal' has been construed to mean as though it were one word, signifying 'male in a line of males.' With this construction I entirely agree; and I agree that it may be read as though it were a compound word 'male line'" (per Bramwell, B., in *Thellusson* v. *Rendlesham*, 7 H. L. at p. 455). "Nearest of kin in the male line," see *Boys* v. *Bradley*, 1853, 22 L. J. Ch. 617; 25 L. J. Ch. 593.

Male Servant.—See EXCISE, vol. v. p. 115.

Malice.—The meaning of the term malice (*malitia*) in English law has been a question of much difficulty and controversy; and those who wade through the many disquisitions on the subject in text-books and judges' opinions are almost tempted to the conclusion that the meaning varies almost infinitely *secundum subjectam materiem*, and that the only sense which the term can safely be predicated not to have in any given legal context is that which it has in popular language, viz. spite or ill-will. It certainly has different meanings with respect to responsibility for civil wrongs and responsibility for crime; and even with respect to crime it has a different sense as it is used with reference to murder, libel, or the capacity of an infant to commit crime, expressed by the rule *malitia supplet ætatem*.

Civil Aspect.—So far as civil proceedings are concerned, the means of an authoritative solution are to be found in the opinions of the majority of the law lords in *Allen* v. *Flood*, [1898] App. Cas. 1; and the possible views and the relevant authorities on either side are fully discussed by the law lords and the consulted judges, and those of the Courts appealed from. The result of the case appears to be to declare the following propositions as representing the English law:—

1. As a general rule, malice in the sense of spite, ill-will, or hostility, is not the gist of any action. A *damnum absque injuriâ* (see INJURIA), if accompanied by a malicious intent in this sense, gives no cause of action; and a malicious motive *per se* does not amount to an *injuria* or legal wrong. But there has been a tendency in this matter from a very early period to confuse the several provinces of English law, and of morals and religion. The older common law, for purposes of civil remedies, took account only of acts or omissions, and not of the motives with which they were done. The notion of sin or of public disapproval was superadded to this, with a view to extending the domain of legal wrongs so as to include within it matters belonging to ethics or religion. It has been said that every combination was punished as a conspiracy which was disapproved by the judges, as expressing the opinions of the ruling classes; and it was not till the *Mogul* case, [1892] App. Cas. 25, that a stop was put to this development by the adoption of the views of Bowen, L.J., who rejected the proposition

that "an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade." He pointed out that "obscurity lies in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words which have accurate meanings well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not insensibly slide. An intent to injure in strictness means more than an intent to do harm. It connotes an intent to do wrongful harm. Maliciously, in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports, in its turn, the infringement of some right, *i.e.* some right which the law recognises and exists to protect. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense." This is the main proposition in *Allen* v. *Flood*, [1898] App. Cas. 1. It had already been asserted in *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186, 191; and by the House of Lords in *Bradford* (*Mayor*), *etc.* v. *Pickles*, [1895] App. Cas. 587, with reference to acts done by a man on his own land within his legal rights with the object of prejudicing an adjoining owner by diverting water which would otherwise have percolated to and benefited the adjoining owner. This conclusion adopts the view of Bayley, J., in *Bromage* v. *Prosser*, 1825, 4 Barn. & Cress. 255, that "malice in its legal sense means a wrongful act done intentionally, without just cause or excuse"; and the adoption of the conclusion is equivalent to an admission that malice is a term which has crept into law books, with a result so confusing that the law has suffered by its presence, and cannot be correctly interpreted except by explaining it away or relegating it to its proper place in ethics or religion. Where the man has no right to do the act, the fact that he does it out of spite or ill-will does not affect the cause of action, though it may entitle the Court or jury to award exemplary damages, as in the case of a wanton, persistent, and offensive trespass to land (*Merest* v. *Harvey*, 1814, 5 Taun. 442).

2. In certain classes of actions it has been usual to say that the wrongful act was done maliciously, *e.g.* libel and malicious prosecution. In the first, the allegation of malice was never essential (*Bromage* v. *Prosser*, 1825, 4 Barn. & Cress. 247), and appears at most to mean no more than deliberation as distinct from accident; and no evidence of malice need be given by the petitioner, except where the libel was a privileged communication. In the second, the malice must be not only alleged but proved. It resembles libel uttered on a privileged occasion, in which event express malice has to be proved by the plaintiff, to succeed in his action. These two cases appear to stand by themselves, since the decision in *Allen* v. *Flood*, as the only cases in which motive is essential to constitute the legal wrong; and attempts, not wholly satisfactory, were made by Lords Watson, Herschell, and Davey to explain away their exceptional character. See MALICIOUS PROSECUTION.

3. There remains the case of actions for conspiracy, the position of which cannot yet be said to be satisfactorily defined. In an indictment for conspiracy the word "maliciously" is not used. In civil proceedings the words "conspiracy" and "malice," when combined, appear to be an attempt by collocation of vituperative words to make that a legal wrong which *simpliciter* would not be so; and the tendency, if not the result, of the cases is that an action for conspiracy *per se* will not lie: *i.e.* that some particular legal wrong must have been wrought by the combination of joint wrong-doers, and that the gist of the cause of action is not the combination

or motive, but the infringement of the right of others (*Mogul* case, [1892] App. Cas. 25; *Allen* v. *Flood*, [1898] App. Cas. 1; *Kearney* v. *Lloyd*, 1889 26 L. R. Ir. 268; *Huttley* v. *Simmons*, [1898] 1 Q. B. 181).

Criminal Aspect.—In the criminal law the terms "malicious" and "maliciously" have appeared both in common law and statute, and have caused almost equal confusion. But it is there more important, as public law demands in many cases proof of motive before inflicting punishment, while in private law it is concerned with the injury or damage rather than the motive which occasioned it. This cannot be better illustrated than by pointing out that whereas it is a defence to proceedings for a criminal trespass that it was done in *bonâ fide* assertion of a reasonable claim of right, such a defence would utterly fail in a civil action as to the same trespass.

To constitute the crime of murder there must be "malice aforethought" (*malice prepensé*), *i.e.* with premeditation or other circumstances indicating the same kind of malignity (Steph. *Dig. Cr. Law*, 5th ed., p. 412). But, theoretically, such malice is presumed from the killing, and the accused must rebut the presumption. The history and nature of this doctrine is dealt with under MURDER.

To constitute the crime of libel, the publication, it has been said, must be "malicious." Until justification was permitted by Lord Campbell's Act, 1843, it could not be suggested that malicious meant with malice *in fact*, *i.e.* personal spite or ill-will.

Even if the suggestion were accepted, no proof of such personal spite or intent to injure was required, except where the defendant, under the plea of "not guilty," proved that the publication was on a privileged occasion, in which case abuse of the privilege or express malice, *i.e.* ill-will in the popular sense, had to be proved (*R.* v. *Harvey*, 1823, 2 Barn. & Cress. 257; *Bromage* v. *Prosser*, 1825, 4 Barn. & Cress. 247; *Haire* v. *Wilson*, 1829, 9 Barn. & Cress. 643).

But it is clear that Lord Campbell's Act, 1843, in no way altered the common law definition of defamatory libel (*R.* v. *Munslow*, [1895] 1 Q. B. 758). In civil proceedings for libel the only difference is that the evidence of intention need not be so strong, motive being there immaterial, *e.g.* a defamatory statement made by a slip or misprint is libellous (see *Emmens* v. *Pottle*, 1885, 16 Q. B. D. 354).

It is not essential to include the word "maliciously" in an indictment for libel, and the word "unlawfully" has the effect usually attributed to the word "maliciously." So the matter may be regarded as now definitely settled that a publication is "malicious" where it is motived by malice *in law*, *i.e.* where it is intentionally and not accidentally or unwittingly made without just cause or excuse, one of such just causes being that which can now be raised by proof of justification.

The use of the term "maliciously," with reference to criminal trespass to property, seems to be intended to require proof of something more than the mere fact of trespass, which would give a right of civil action to the owner irrespective of the motives of the trespasser, unless the latter could show the trespass to be utterly without his force. By sec. 58 of the Malicious Damage Act, 1861 (c. 97), which is applied to offences under the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 15), in proving malicious damage it is made immaterial whether the accused acted from malice conceived against the owner of the thing damaged, or otherwise. It is submitted, unless the last words mean malice conceived against other persons or society at large, that the clause makes it unnecessary

to prove malice at all, or implies it from proof of an act done "intentionally," without any honest and reasonable claim of right, even when so done with force and consequent damage in excess of what assertion of the claim of right demands (see *Gayford* v. *Chouler*, [1898] 1 Q. B. 316; *R.* v. *Clemens*, [1898] 1 Q. B. 556). See MALICIOUS DAMAGE.

If this be the correct view, the word "maliciously," but for its appearance in the statutory definition, would be unnecessary in the indictment, the quality of the act being sufficiently indicated by "feloniously" or "unlawfully." But in all the sections where the word "maliciously" is used, the word "unlawfully" also occurs, and it is difficult to resist the inference that something more is meant in this Act by malice than mere wrongfulness. Possibly deliberate and intentional doing of an act known to be wrongful is meant, apart from any question of the other particular intents (*e.g.* to injure) contained in the particular enactment, and certainly the elements of negligence or mischance are excluded (4 Black. *Com.* 222), unless the act or omission is recklessly done (*R.* v. *Child*, 1871, L. R. 1 C. C. R. 307; *R.* v. *Pembliton*, 1874, L. R. 2 C. C. R. 119; *R.* v. *Welch*, 1875, 1 Q. B. D. 23). If this be its meaning, the word "wilfully" would more correctly describe the nature of the act. But that word occurs only twice in the Act—(s. 36) "by any unlawful act or wilful omission and neglect," and (s. 52) where "wilfully" and "maliciously" are conjoined, and "unlawfully" is omitted. In the absence of clear authority upon this subject it is difficult to say what the exact connotation of malice in the context is; but this much may safely be affirmed, that it involves some degree of knowledge and intention greater than would be required in a civil action in respect of the damage done, and that its presence in the statute justifies an inquiry into the motives of the accused, although, on such inquiry, the presumption appears to be against him, *i.e.* that his act, if intentional, was criminal. See also GUILTY MIND; MALICIOUS DAMAGE.

Infants under seven are protected from responsibility for crime by the absolute presumption (*juris et de jure*) that they are *doli incapaces*. From seven to fourteen they are presumed still incapable of crime; but the presumption made may be rebutted under the rule *malitia supplet ætatem*. This, it is said, does not mean malice in the popular sense, nor malice in law as above discussed, but capacity to distinguish between right and wrong (*R.* v. *Owen*, 1830, 4 Car. & P. 236; and see INFANTS, vol. vi. at p. 406). It cannot be said that the rule has received any scientific or satisfactory legal exposition, or one consistent with the now prevailing doctrine as to the legal elements of malice. But the position of children in law must in truth be considered with that of idiots, imbeciles, and lunatics, *i.e.* as persons whose stage of mental development deprives them of the responsibility for their acts imposed on average and ordinary citizens.

Malicious Damage.—Besides those offences against property which involve fraud or misappropriation, *e.g.* FORGERY and LARCENY, there is another class where property is destroyed or damaged, and not acquired or appropriated, and where the motive of the destruction is spite, or ill-will, or an intent to injure, rather than fraud or misappropriation.

Except in the case of ARSON, it would seem that such destruction or damage is not indictable at common law unless accompanied by tumult or force, as in the case of AFFRAY, RIOT, or UNLAWFUL ASSEMBLY (see ASSEMBLY, UNLAWFUL), and in such a case the gist of the offence is the actual disturb-

ance of the public peace, and not the particular damage incidentally done.

The common law remedy for such injuries, where they do not affect the public peace, was, and is, by action for trespass to land or goods.

The bulk of the statutory enactments making such trespass criminal, passed at various times and with varying objects, has been consolidated into the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). The Act is divided into a series of sub-headings, which are not mutually exclusive and cannot be said to be based on any scientific classification, as the policy of the Legislature in this as in the other Criminal Law Consolidation Acts of 1861 appears to have been not to simplify, systematise, or generalise the law but merely to collect together the enactments passed at different times to cope with forms of mischief then prevalent.

There is a common element in the definition of the offences specified in the Act, viz. the use of the words "unlawfully and maliciously," which occur in all but four cases: secs. 36, 47, where "maliciously" is omitted as to certain offences, and secs. 52 and 53, where "wilfully or maliciously" is substituted. The term "unlawfully" occurs whether the offence is made felony or misdemeanour, and appears to be advisedly inserted to exclude all cases in which the person accused of an offence has a right by virtue of his ownership to damage or destroy the thing in question. The meaning of "maliciously" is difficult to define, and has already been discussed under MALICE. It certainly connotes that the act is intentional and not inadvertent, nor due to neglect other than reckless neglect or mere mischance, and that it is not done under a reasonable belief in the existence of a right to do the act alleged to be criminal (*R.* v. *Twose*, 1879, 14 Cox C. C. 327). But malice against the owner of the damaged property is clearly not essential (1861, c. 97, s. 58; *R.* v. *Tivey*, 1844, 1 Den. Cr. C. 63; *R.* v. *Welch*, 1875, 1 Q. B. D. 23).

Of the sub-headings, the following are dealt with under other titles, viz.:—

Damage by means of fire, under ARSON, vol. i. p. 332.

Damage by means of explosives, under EXPLOSIVES, vol. v. p. 249.

Damage during riots, under RIOT.

Threats to commit damage, under MENACES, *post.*

The residue are classified by reference to the thing damaged, or the particular intent with which the damage is done.

In no case can a man be convicted under the Act for damage to his own property; but where he is co-owner he may be liable (*R.* v. *Wallace*, 1841, Car. & M. 200; *R.* v. *Newboult*, 1872, L. R. 1 C. C. R. 344); and the penal sections apply even where the accused is in possession of the property damaged (1861, c. 97, s. 59).

Animals.—The term cattle includes horses, asses, and pigs (*R.* v. *Chalkley*, 1813, Russ. & R. 258; *R.* v. *Whitney*, 1824, 1 Moo. C. C. 3; *R.* v. *Chapple*, 1804, Russ. & R. 77). It is considered necessary to state the species of cattle injured (*R.* v. *Chalkley*, *supra*). It is punishable by penal servitude from three to fourteen years. The cattle must belong to a person other than the accused, otherwise the element of unlawfulness would be absent. Killing a cow by setting fire to an outhouse in which she was is within the definition (*R.* v. *Haughton*, 1833, 5 Car. & P. 559); and the use of any instrument need not be stated or proved (*R.* v. *Bullock*, 1868, L. R. 1 C. C. R. 115). The enactment has been held not to include killing by worrying with a dog (*R.* v. *Hughes*, 1826, 2 Car. & P. 420). Maiming means causing permanent injury, but not necessarily external; wounding, an injury external,

but not necessarily permanent (*R.* v. *Jeans*, 1844, 1 Car. & Kir. 539; *R.* v. *Haywood*, 1801, Russ. & R. 16).

To kill, maim, or wound any dog, beast, or bird or other animal, not being cattle, but either the subject of larceny at common law or ordinarily kept in a state of confinement or for a domestic purpose, is a petty misdemeanour punishable on summary conviction—(1) on a first offence, by imprisonment with hard labour for not over six months, *or* by forfeiture of a sum (not exceeding £20) over and above the amount of injury done; (2) on a second or subsequent offence, by imprisonment with hard labour for over twelve months (1861, c. 97, s. 4). The accused can in either case elect to be tried on indictment (1879, c. 49, s. 17). Under the Act of 1861 one justice could determine it. Now a petty sessional Court alone is competent. These enactments do not apply to an animal belonging to the accused. Ill-treatment in such a case falls under the Cruelty to Animals Acts. Poisoning a dog by laying poisoned meat for it in an enclosed garden is not within the enactment (*Daniel* v. *James*, 1877, 2 C. P. D. 351). As to killing or injuring animals by poison, see POISON.

Buildings.—Damage to buildings is not indictable under the Act, unless effected by fire or explosives or during riot, except where tenants pull down or demolish wholly or in part buildings in their possession or sever fixtures from the freehold, which is an indictable misdemeanour (1861, c. 97, s. 13; 1891, c. 69, s. 1).

Bridges.—Damage to any bridge, viaduct, and aqueduct is dealt with under BRIDGES, vol. ii. p. 247.

Embankments.—It is a felony—(1) to break down or otherwise damage or destroy a sea bank, sea wall, or bank wall or dam of a river, canal, drain (see SEWERS), reservoir, pool, or marsh, whereby land is flooded or put in danger of flooding; (2) to throw, break or cut down, level or undermine or otherwise destroy a quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to a port, harbour, dock, or reservoir, or on or belonging to a navigable river or canal. It is punishable by penal servitude for life or not less than three years (1861, c. 97, s. 30; 1891, c. 69, s. 1).

Fences.—Damage to fences, walls, stiles, or gates is summarily punishable by fine not exceeding £5, in addition to compensation for the damage. The enactment seems not to apply where the damage is done in *bonâ fide* assertion of a right of way (*Evison* v. *Marshall*, 1868, 32 J. P. 691). A second offence is summarily punishable by imprisonment up to twelve months, subject to election to be tried by jury (1861, c. 97, s. 25; 1879, c. 49, s. 17).

Fish and Fishponds.—See FISH, vol. v. p. 358.

Machinery and Manufactures.—The demolition of machinery by rioters is dealt with under RIOT. It is felony also to cut, break, or destroy, with intent to destroy or render useless, goods or warps of silk, wool, cotton, hair, mohair, or alpaca in process of manufacture, or looms, frames, or machinery or implements used in the manufacture, or to enter premises forcibly with intent to commit the offences. It is punishable by penal servitude for life or not less than three years. The like acts with reference to fixed or moveable machinery of other manufactures or machines or engines for agricultural operations, are also felonies punishable by penal servitude from three to seven years (1861, c. 97, s. 31).

The offence can be committed by making a machine temporarily useless (*R.* v. *Fisher*, 1865, L. R. 1 C. C. R. 7; *R.* v. *Tacey*, 1821, Russ. & R. 452).

Mines.—To set fire to a coal mine is felony, as is the attempt to do so by any overt act if it would have been felony if successful (1861, c. 97,

ss. 26, 27). It is necessary to specify the ownership of the mine (*R.* v. *Jones*, 1843, 2 Moo. C. C. 293).

It is also felony (1) to let water into a mine with intent to destroy or damage it, or to hinder or delay its working; or, with like intent, (2) to pull down, fill up, obstruct, or damage, with intent to destroy, obstruct, or render useless, an airway, waterway, drain pit, level, or shaft of *any* mine (1861, c. 97, s. 28). This does not apply where adjoining mineowners, working their own mine, cut into another mine (s. 28, proviso); nor where the act is done by workmen under their master's orders, without knowledge that his act is "malicious" (*R.* v. *James*, 1837, 8 Car. & P. 131).

It is also felony to pull down or destroy or damage, with intent to destroy or render useless, any machinery, appliances, or erections used in conducting the business of the mine (1861, c. 97, s. 30).

Plants.—The unlawful and malicious cutting, breaking, barking, rooting up, or otherwise destroying the whole or any other part of a vegetable product, is punishable as follows:—

It is felony if damage to the amount of £1 is done to a tree, sapling, shrub, or underwood growing in a park, garden, orchard, or avenue, or in ground adjoining or belonging to a dwelling-house; or to the amount of £5 to a tree, etc., growing elsewhere (1861, c. 97, ss. 20, 21). Adjoining means "in actual contact" (*R.* v. *Hodges*, 1829, Moo. & M. 341). It is a misdemeanour if the damage exceeds 1s. wherever the tree, etc., is growing, and is unlawful and malicious (c. 97, s. 22); and even if injury under the amount of 1s. is wilfully *or* maliciously committed (c. 97. ss. 52, 53). Destruction of fruit or vegetable products in gardens, orchards, nursery grounds, or conservatories (but not of trees) (*R.* v. *Hodges*, 1828, Moo. & M. 341), (1) in the case of a first offence is a misdemeanour punishable summarily by imprisonment, with or without hard labour, for not over six months, or a fine not exceeding £20 over and above amount of damage done; (2) in the case of a second offence is a felony punishable by penal servitude from three to seven years (1861, c. 97, s. 23).

Destruction of cultivated plants growing in land, open or enclosed, not being a garden, orchard, etc., is a misdemeanour punishable summarily—

(1) On a first conviction by imprisonment for not over a month, or a fine not exceeding £1 over and above the damage done;

(2) and on a second conviction by imprisonment for not over six months with hard labour (1861, c. 97, s. 21). See also HOPS.

Post Office.—Damage to post office letter boxes is a misdemeanour summarily punishable under 47 & 48 Vict. c. 76, ss. 3, 4; and see POST OFFICE.

Railways and Tramways.—See RAILWAY; TRAMWAY.

Shipping.—Besides offences by fire (see ARSON) and EXPLOSIVES against ships, the Act deals with a number of cases which savour of wrecking.

To damage a ship or vessel, whether complete or unfinished, otherwise than by fire or explosive, with intent to destroy it or render it useless, is a felony (1861, c. 97, s. 46).

It is also a felony (1) to mask, alter, or remove a light or signal; (2) to exhibit a false light or signal if it is done in either case with intent to bring a ship or vessel into danger; (3) unlawfully or maliciously to do anything tending to the immediate loss or destruction of a ship, vessel, or boat, not punished in any prior part of the Act (1861, c. 97, s. 47); (4) to cut away, remove, alter, conceal, deface, sink, or destroy any boat, buoy, or rope used or intended for the guidance of seamen, for the purpose of navigation, or to do any act with intent to cut away, etc. (1861, c. 97, s. 48);

(5) to destroy any part of a vessel in distress or wrecked or stranded, or any goods belonging to her (1861, c. 97, s. 49).

Toll-bars and Turnpikes.—It is a misdemeanour to throw down, level, or otherwise destroy in whole or in part a turnpike gate or toll-bar, and the appliances and erections in connection therewith. The enactment applies only to statutory tolls (1861, c. 97, s. 34).

Works of Art.—It is a misdemeanour to destroy or damage (1) books, MSS., or any other articles kept in public museums for purposes of art, science, or literature; (2) pictures, monuments, or stained glass in places of divine worship, or in buildings belonging to the Crown or public bodies, or erected in public places. It is punishable by imprisonment with or without hard labour for not over six months (1861, c. 97, s. 39).

General.—Besides the specific provisions already dealt with, the Act contains two general provisions.

To commit any damage, injury or spoil to or upon any real or personal property whatsoever, either public or private, which is not punishable under secs. 1–50 of the Act, is a misdemeanour punishable (1) on indictment, if the amount of damage exceeds £5, and the act is unlawful *and* malicious, by imprisonment with or without hard labour for not over six months; (2) summarily, where it does not exceed £5, and the act is "wilful" *or* "malicious." For a first offence the punishment is a fine not exceeding £5, or imprisonment for not over two months, *and* an order to pay compensation not exceeding £5 to the party aggrieved.

No liability is incurred if the damage was done under a fair and reasonable supposition that the accused had a right to do the act complained of, or in the case of a trespass, not wilful or malicious, committed in hunting and fishing, or in the pursuit of game (1861, c. 97, ss. 52, 53).

It is not enough to have a *bonâ fide* belief that the act done is legal.

The claim made must be of a right known to the law (*Hargreaves* v. *Diddams*, 1875, L. R. 10 Q. B. 582; *Pearce* v. *Scotcher*, 1882, 9 Q. B. D. 162; *Watkins* v. *Major*, 1875, L. R. 10 C. P. 662). It is for the justices to find whether *bona fides* existed, but they cannot give themselves jurisdiction by finding against it without evidence (*Denny* v. *Thwaites*, 1877, 2 Ex. D. 141; *White* v. *Feast*, 1872, L. R. 7 Q. B. 353; *Reece* v. *Miller*, 1882, 8 Q. B. D. 626). This defence is distinct from the *bonâ fide* claim of title to real property which ousts the jurisdiction of the justices.

The decisions on this enactment are at present in conflict as to whether damage to the realty includes damage to products of the realty, *e.g.* wild mushrooms or grass (*Gardner* v. *Mansbridge*, 1887, 19 Q. B. D. 217; *Gayford* v. *Chouler*, [1898] 1 Q. B. 316; *Laws* v. *Eltringham*, 1881, 8 Q. B. D. 283).

The general rules as to accessories and abettors apply to all these offences (1861, c. 97, s. 63; and see ABETTOR; ACCESSORY). Offences in the Admiralty jurisdiction are within the Act (1861, c. 97, s. 72).

Punishment.—In case of indictable offences, instead of the term of penal servitude imposed by the enactment creating the offence (modified in 1891), imprisonment with or without hard labour can be imposed for not over two years, except, possibly, in the case of offences punishable as misdemeanours without specification in the Act of 1861 of the term (see 54 & 55 Vict. c. 69, s. 1).

As to whipping of males under sixteen, see WHIPPING.

Procedure.—Persons "found committing" an offence against the Malicious Damage Act, 1861, whether punishable summarily or on indictment, may be arrested without warrant by a peace officer or the owner of the property

injured, or his servant, or any person authorised by him; and peace officers may arrest without warrant persons found lying or loitering in a highway or other place during the night whom he has good cause to suspect of having committed or being about to commit a felony against the Act (1861, c. 97, ss. 57, 61).

Summary Proceedings.—The proceedings for offences punishable summarily are regulated by the S. J. Acts (which empower the summary conviction of children between seven and twelve for any offence under the Act (1879, c. 49, s. 11)). These Acts limit the powers of punishment by a single justice, but do not affect the special provisions of the Act of 1861, (1) as to the application of fines or forfeitures for damage done (s. 64); (2) as to committal for non-payment (s. 65); (3) as to discharge on first conviction on paying damages and costs (s. 65; cp. 1879, c. 49, s. 16).

A summary conviction followed by payment of penalties and costs is a bar to all other proceedings, civil or criminal, for the same matter (s. 67).

Appeal lies against a conviction by one justice, or where more than £5 fine or more than one month's imprisonment is imposed (s. 68).

The fact that the person aggrieved by the malicious injury is a witness does not disentitle him to receive compensation on summary proceedings (18 & 19 Vict. c. 126, s. 22; 39 & 40 Vict. c. 20, s. 4).

Where the amount of damage is the essence of the offence, or affects the scale of punishment, it must be specified and proved (*R.* v. *Thoman*, 1871, 12 Cox C. C. 54). Damage means the actual damage to the thing injured, not the cost of reinstatement or consequential damage (*R.* v. *Whiteman*, 1854, D. & P. 353).

As to form of indictment, see INDICTMENT, vol. vi. p. 371.

[*Authorities.*—Archbold, *Cr. Pl.*, 21st ed.; Russell, *Crimes*, 6th ed.; Stephen, *Dig. Cr. Law*, 5th ed.; Atkinson, *Magistrates' Annual Practice*, 1898.]

Malicious Prosecution.—As a general rule, any person is entitled, though not bound (except perhaps in cases of treason and felony (see MISPRISION)), to lay before a judicial officer information as to any criminal offence which he has reasonable and probable cause to believe has been committed, with a view to ensuring the arrest, trial, and punishment of the offender. The bulk of criminal prosecutions are conducted in England by private citizens in the name of the Crown. This exercise of civic rights constitutes what is termed a privileged occasion with reference to the law of libel; but if the right is abused, the person injured thereby is, in certain events, entitled to a remedy.

Criminal Remedy.—The criminal remedies available for malicious prosecution on a criminal charge are by proceedings (1) for perjury if that offence was committed in the prosecution; (2) for conspiracy to pervert the course of justice. See CONSPIRACY, vol. iii. p. 289.

Civil Remedy.—The first remedy used for malicious prosecution was statutory, by the civil writ of conspiracy, framed on the ordinance of conspirators (1304, 33 Edw. I. st. 2), passed with the object of giving a means of indemnity for vexatious indictments and appeals of felony (see CONSPIRACY, vol. iii. p. 289). To give a cause of action under this writ, it was necessary to show a combination as well as a prosecution. The writ is said to have originally applied to treason and felony only; but as early as 1275 a proceeding for a malicious indictment for trespass is recorded (Steph. *Mal. Pros.* 20). Fitzherbert, N. B. 116, states that it also extended to

malicious actions at *nisi prius*, but is contradicted by a case in Y. B. 39 Edw. III. f. 13 *a*. The old ordinance is not repealed, but actions on it have fallen into disuse, though they do not appear to be directly affected by the decisions in the *Mogul* case, [1892] App. Cas. 25; or *Allen* v. *Flood*, [1897] App. Cas. 1; or *Huttley* v. *Simmons*, [1897] 1 Q. B. 181.

By the beginning of the seventeenth century, if not earlier, an action of trespass on the case for malicious prosecution had been devised to cover instances in which the prosecution involved no conspiracy or joint tort (*Cox* v. *Wirrall*, 1606, Cro. (1) 193; *Savile* v. *Roberts*, 1678, 1 Raym. (Ld.) 374). The action was from the first distinct from the action of FALSE IMPRISONMENT (vol. v. p. 311), which was one for TRESPASS TO THE PERSON. That action involves interference with personal liberty without judicial sanction, and even where the imprisonment is for the purpose of taking before a judicial officer it ceases as soon as the judge is seised of the charge (*Lock* v. *Ashton*, 1848, 12 Q. B. 871; *Austin* v. *Dowling*, 1870, L. R. 5 C. P. 534). There is no trespass to the person in a malicious prosecution, because the prosecutor does not of his own authority interfere with the liberty of the accused, and because the magistrate, if competent, is protected *virtute officii* by his judicial privilege with respect to his interference with liberty. These considerations are not in any way affected by the changes of civil procedure, and leave the gist of the action for malicious prosecution exactly as established under the common law. At one time it was contended that malicious prosecution could take place only on charges of treason or felony, but now it is immaterial whether the prosecution was for an offence punishable summarily only or for an indictable offence (*Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304).

The constituent elements, *i.e.* the matters which the plaintiff must prove to succeed in an action of malicious prosecution, are four:—

1. The determination in his favour of the prosecution against him (*Fisher* v. *Bristow*, 1779, 1 Doug. 215).

2. That the defendant in the action was the prosecutor of the criminal charge.

3. That there was no reasonable or probable cause for instituting or proceeding with it (*Willans* v. *Taylor*, 1829, 6 Bing. 183; 31 R. R. 379).

4. That the prosecutor was also influenced by malice in fact in beginning or continuing the prosecution (*Purcell* v. *Macnamara*, 1808, 9 East, 361; 9 R. R. 578).

1. *Acquittal.*—Unless the plaintiff can show that the prosecution ended in his favour, he must fail in the action, being estopped from complaint by the record or certificate of conviction. He can prove the determination by showing (*a*) that process was refused, (*b*) that a bill of indictment was ignored, (*c*) that the accused was acquitted (*Basébé* v. *Matthews*, 1867, L. R. 2 C. P. 684).

There is an old case to the effect that a *nolle prosequi* is not an acquittal for this purpose (*Goddard* v. *Smith*, 1705, 6 Mod. 262). But it appears inconsistent with later authorities, and on them was rejected in a recent colonial case (*Gilchrist* v. *Gardner*, 1891, 12 N. S. W. L. R. 184). The acquittal need not be on the merits (*Taylor's* case, 1620, Pal. 44; *Chambers* v. *Robinson*, 1732, 2 Stra. 691; *Pippet* v. *Hearn*, 1822, 5 Barn. & Ald. 634). Where the proceeding is one which in its nature cannot be determined in favour of the person accused, such determination need not be proved. This can arise only on swearing the peace on a man under the old procedure (*Stewart* v. *Gromett*, 1859, 7 C. B. N. S. 191; 42 & 43 Vict. c. 49, s. 25).

2. *Prosecution.*—A man prosecutes a charge who lays an information before a magistrate accusing of the offence (*Davis* v. *Noake*, 1816, 1 Stark. 377; 18 R. R. 290), or in making an oral accusation before a justice (*Dawson* v. *Van Sandeau*, 1863, 11 W. R. 513), or in taking any active part in a prosecution at any stage (*Fitz-John* v. *Mackinder*, 1861, 9 C. B. N. S. 505), including preferring a bill before the grand jury (*Payn* v. *Porter*, 1619, Cro. (1) 490; *Smith* v. *Cranshaw*, 1625, Jones (Sir W.) 93); whether it is ignored or is found and is followed by acquittal on any ground (*Taylor's* case, 1620, Pal. 44; *Chambers* v. *Robinson*, 1732, 2 Stra. 691), and whether the Court to which the accusation was made was or was not competent to adjudicate on it (*Attwood* v. *Monger*, 1653, Sty. 378), and whether or not the prosecutor was under recognisance to prefer the bill (*Fitz-John* v. *Mackinder*, 1861, 9 C. B. N. S. 505).

Controversy arises in modern times under this head mainly on the questions—

(1) Whether the defendant merely told a police officer of the supposed offence or actively took up its prosecution.

(2) Whether an employer, corporate or other, gave any express or implied authority to servants or agents to institute the particular prosecution (*Bank of New South Wales* v. *Owston*, 1879, 4 App. Cas. 270; *Walker* v. *London and South-Western Rwy. Co.*, 1871, L. R. 6 Q. B. 65). This question more often arises as to false imprisonment, as the time taken in prosecution gives employers time to decide whether they will ratify their agent's act. But see *Knight* v. *North Metropolitan Tramways Co.*, 1898, 14 T. L. R. 286.

3. *Reasonable or probable cause* is a question of law for the judge as it arises on the facts disclosed; and if there be any discrepancy in the testimony or imputations on the credit of the witnesses, these are matters for the decision of the jury, and, as in questions touching reasonable notice and the like, the judge must pronounce his opinion on the facts when found by the jury (*Willans* v. *Taylor*, 1829, 6 Bing. 183, Tindal, C.J.; 31 R. R. 379). In other words, reasonable and probable is a mixed proposition of law and fact. Whether the circumstances alleged to show that the cause was probable or not probable are true and existed is a matter of fact; but whether, supposing them true, they amount to a probable cause is a question of law (*Sutton* v. *Johnstone*, 1786, 1 T. R. 491, 510; 1 R. R. 257; *Lister* v. *Perryman*, 1870, L. R. 4 H. L. 521). It is said that it is not a question of law "because no definite rule can be laid down for the exercise of the judge's judgment," but the learned Law Lords seem to have there insufficiently considered the action and to have confused it with that for false imprisonment (see *Hicks* v. *Faulkner*, 1882, 46 L. T. 127, 128). It is the everyday duty of a judge in a Crown case to tell the jury that if certain facts are proved to their satisfaction they constitute the crime charged. In malicious prosecution the question is similar but subjective, viz. what materials had the prosecutor before him upon which to ground his prosecution. If the statements of others or his own observation, assuming their accuracy, would prove the commission of the offence, or create a presumption, or amount to *primâ facie* evidence of its commission, the judge there, as in a criminal trial, rules that reasonable and probable cause exists. But their truth or accuracy is not, as a rule, directly in question, it being unusual to contend in the action that the offence was in fact committed.

The difficulties expressed in *Lister* v. *Perryman*, as to the severing the functions of judge and jury, have been solved by the questions framed in *Hicks* v. *Faulkner*, 1882, 8 Q. B. D. 167, and *Abrath* v. *North-Eastern Rwy. Co.*, 1883, 11 Q. B. D. 440, and approved by the House of Lords in the

latter case (1886, 11 App. Cas. 247). Subject to the special facts of the particular case, the questions are—(1) Did the prosecutor take reasonable care to inform himself of the facts? (2) Did the prosecutor honestly believe in the case which he laid before the Court? and if both these questions are answered in the negative, (3) Was the prosecutor actuated by malice, *i.e.* some motive other than an honest desire to bring to justice a man believed to have offended against the criminal law?

The existence of reasonable and probable cause does not avail if the prosecutor prosecuted in ignorance of it (*Delegal* v. *Highley*, 1837, 3 Bing. N. C. 950).

The dismissal of a prosecution does not create any presumption of the absence of reasonable and probable cause (*Byne* v. *Moore*, 1813, 5 Taun. 187; *Mitchell* v. *Jenkins*, 1833, 5 Barn. & Adol. 594). The absence of reasonable and probable cause is not *per se* evidence of malice; and a finding that the defendant honestly believed in the case laid before a Court or magistrate is conclusive against the plaintiff's right of action (*Brown* v. *Hawkes*, [1891] 2 Q. B. 718). Conversely, the most express malice will not give a cause of action if reasonable and probable cause existed (*Willans* v. *Taylor*, 1829, 6 Bing. 183), nor can the absence of the latter be inferred from the existence of malice (*Incledon* v. *Barry*, 1805, 1 Camp. 203 *n*; *Turner* v. *Ambler*, 1846, 10 Q. B. 252; *Hailes* v. *Marks*, 1861, 7 H. & N. 56).

4. The *malice* to be proved in this form of action is malice in fact, not malice in law. In this respect the action differs from most civil actions, in which motive is not an essential element constitutive of the wrongfulness of the act. This special characteristic has been considered by several of the Law Lords in *Allen* v. *Flood*, [1898] App. Cas. 1, who by divers *obiter dicta* have treated it as exceptional, and by Sir Frederick Pollock, who in a note to the case ([1898] App. Cas. 181, and see article TORTS) submits that in this action "evil motive is material because the defendant's act is in itself of a wrongful nature, and is privileged when done, and only when done in good faith." This proposition appears to be founded on an attempt to reconcile the supposed inconsistencies of the common law, and to misconstrue the known history of the particular cause of action. It is because the occasion is so far privileged as absolutely to bar the ordinary action of trespass, and as to permit an action *in consimili casu* only where the privilege is abused, that the plaintiff has to prove abuse of the privilege instead of the defendant having to justify an act which on Sir F. Pollock's theory would be *primâ facie* unlawful.

In libel the burden of proof is on the defendant to establish privilege. When that is done, he is in a position analogous to that of the defendant in an action for malicious prosecution. But there is no judicial authority which will justify the proposition that the institution of legal proceedings has ever been presumed to be an actionable wrong, however vexatious they may be. But, apart from modern theory, it is enough for the present to point out that express malice, or malice in fact, *i.e.* a deliberate intention to abuse legal rights, has always been recognised to be of the essence of the action.

This fact has led to controversy on the point whether a corporation is capable of such malice as will support the action apart from questions of agency. The only express English authority is *Edwards* v. *Midland Rwy. Co.*, 1881, 6 Q. B. D. 287; against which must be set the *obiter dicta* of Lord Bramwell in *Abrath's* case (1886, 11 App. Cas. at 257), in which the other Law Lords abstained from concurring. In the United States Supreme Court the view expressed in *Edwards'* case has been adopted.

The malice need not, of course, be directly proved, but may be inferred from the circumstances of the prosecution, and the absence of belief in its truth or substance, or the active presence of enmity and spite (see Roscoe, *Evidence*, 16th ed., 882).

Damage is not the gist of the action in the sense that it is necessary to prove any special damage, such as loss of profits of trade or profession, or expense in defence, and the jury without proof of any such special damage may give general, even exemplary, damages for the loss of credit and reputation to be inferred from the nature, publicity, and circumstances of the prosecution (Mayne, *Damages*, 5th ed., 447).

Besides the ordinary action for malicious prosecution, there are certain other actionable wrongs of a very similar, if not identical, character, viz.—

(*a*) Malicious arrest on civil process.

(*b*) Malicious issue of a search warrant.

(*c*) Malicious prosecution of bankruptcy proceedings.

(*a*) The first is not actionable unless it involves interference with liberty (*Spence* v. *Jacob*, 1828, M. & M. 180; *George* v. *Radford*, *ibid.* 245; *Webb* v. *Hill*, *ibid.* 253); but the writ of arrest must have been set aside, except perhaps where process is used to extort property, or for a purpose other than that for which it was lawfully issued (*Grainger* v. *Hill*, 1838, 4 Bing. N. C. 212). Though there is one ancient authority that an action will lie against a person for bringing a groundless action (*Attwood* v. *Monger*, 1653, Sty. 378), there is no modern precedent except of unsuccessful actions for vexatious civil proceedings *in rem* (*Castrique* v. *Behrens*, 1861, 3 El. & El. 720; *Redway* v. *M'Andrew*, 1873, L. R. 9 Q. B. 74; *Munce* v. *Black*, 1858, 7 Ir. C. L. R. 475), and all these cases are inconsistent with *Quartz Hill Gold Mining Co.* v. *Eyre*, 1883, 11 Q. B. D. 674. Moreover, most if not all, the special damage in such an action is covered by the modern law as to costs.

(*b*) Maliciously procuring the issue of a search warrant was recognised as actionable in *Elsee* v. *Smith*, 1822, 1 D. & R. 28, and *Wyatt* v. *White*, 1860, 29 L. J. Q. B. 193; and see *Jones* v. *German*, [1897] 1 Q. B. 374.

These cases appear inconsistent with, and of better authority than, *Hope* v. *Evered*, 1886, 17 Q. B. D. 338, and *Lea* v. *Charrington*, 1889, 23 Q. B. D. 45, in the latter whereof the Court of Appeal advisedly refrained (p. 272) from approving the law laid down in the former.

(*c*) Maliciously prosecuting proceedings to make a man bankrupt or wind up a company is actionable. But the application must have failed or the order made on it been rescinded (*Whitworth* v. *Hall*, 2 Barn. & Adol. 695; *Quartz Hill Gold Mining Co.* v. *Eyre*, 1883, 11 Q. B. D. 674; *Metropolitan Bank* v. *Pooley*, 1885, 10 App. Cas. 210).

[*Authorities.*—H. Stephen, *Malicious Prosecution*, 1888; Bullen and Leake, *Proc. Pl.*, 3rd ed.; Clerk and Lindsell, *Torts*, 2nd ed.; Pollock, *Torts*, 5th ed.; *L. Q. R.* April 1898; Vin. *Abr.* tit. "Action on the Case."]

Malins' Act.—This title is applied to (*a*) the Act to enable married women to dispose of reversionary interests in personal estate (20 & 21 Vict. c. 57), and also, but less frequently, to (*b*) the Infant Settlement Act, 1855 (18 & 19 Vict. c. 43). For the latter Act, see INFANTS and SETTLEMENTS. The former Act corresponds to sec. 77 of the Fines and Recoveries Act, by which (*inter alia*) a married woman was enabled to dispose of reversionary interests in real estate (see *Miller* v. *Collins*, [1896] 1 Ch. 573). It provides that after 31st December 1857 any married woman

may, by deed, dispose of every future or reversionary interest, whether vested or contingent, legal or equitable (*Witherby* v. *Rackham*, 1891, 60 L. J. Ch. 511; *In re Turner*, 1892, 66 L. T. 758; see *Alleard* v. *Walker*, [1896] 2 Ch. 36, *infra*), to which she, or her husband in her right, is entitled under any instrument made after such date (s. 1), not being an interest settled upon her by a settlement made on the occasion of her marriage (s. 4), or under a resulting trust in the property subject to such a settlement (*Clarke* v. *Green*, 1865, 2 Hem. & M. 474); and that she may release or extinguish any power of appointment in regard to such personal estate, and also her equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under such an instrument. The deed must be acknowledged by the married woman in accordance with the Fines and Recoveries Act (s. 2), and the husband must concur in it (s. 1). The power conferred by the Act is cumulative. It does not interfere with the exercise of any power of disposition the married woman may have independently of it (s. 3). It does not extend to any interest which she is entitled to under an instrument by which she is expressly restrained from alienating or affecting the interest (s. 1). It has been held that an interest under a will made before, but republished after, 1857 is not within the Act (*In re Elcom*, [1894] 1 Ch. 303; see *In re Bennett*, 1895, 73 L. T. 17).

"Future interest" in the Act means some interest to which the married woman has, at the date of the disposing deed, an existing title, legal or equitable. It does not include an expectancy, *e.g.* upon the death intestate of her father (*Allcard* v. *Walker*, [1896] 2 Ch. 367).

A deed duly executed under the Act bars any claim by the husband or his representatives to the interest passed by it (*In re Batchelor*, 1873, L. R. 16 Eq. 481).

Malta.—The island of Malta has been ruled at various periods of its long history by various masters. In 1530 it was granted by Charles v. to the Knights of St. John, who held it till 1798, when they were dispersed by Napoleon. In 1800 the British fleet took possession, and the island was annexed to the British Crown in 1814. Steps were at once taken to improve the administration of justice; a charter of justice was granted, 28th December 1824; trial by jury was introduced in 1829. In 1836 John Austin and G. C. Lewis were appointed commissioners to report on the government and laws of Malta; they carried out a series of useful reforms, but Austin's large plans of codification stood over for inquiry when the commissioners were recalled. The law now in force is based on Roman law, as modified by local legislation and usage; on the Code Rohan, compiled in the time of the Grand Master of that name; and the more modern codes and ordinances (see the judgment in *Ciantar* v. *Gera*, 1887, 12 App. Cas. 557).

Executive authority in Malta is entrusted to a Governor, who is assisted by an Executive Council. Legislation is carried on by the Council of Government, which now consists of six official and fourteen elected members. There is a Civil Court, divided into a First and a Second Hall; a Court of Commerce; and a Court of Appeal, from which an appeal lies to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL.

Malta is to be deemed to be in Europe (41 Geo. III. c. 103, and 39 & 40 Vict. c. 36, s. 164).

In 1892 certain questions relating to marriages in Malta were referred

to the Judicial Committee of the Privy Council, and on the 18th July 1895 their Lordships reported—(1) That unmixed marriages (*i.e.* marriages between PROTESTANTS) celebrated by Anglican, Presbyterian, and Wesleyan ministers were valid. Anglican marriages were fully sanctioned by inveterate usage, and the grounds upon which the validity of Presbyterian and Wesleyan marriages was maintained, though not so clear, were in their Lordships' opinion sufficient. (2) That mixed marriages (*i.e.* marriages between a PROTESTANT and a Roman Catholic) celebrated in Malta by ministers other than those of the Roman Catholic Church were also valid. Their Lordships intimated that this question was one of great difficulty, and that, notwithstanding the elaborate character of the argument addressed to them, it was possible that in the event of the question coming before them judicially, additional information and authorities might be produced tending to shake the conclusion derived from the materials before them. (3) In the case of persons contracting in good faith, but in such circumstances that the validity of the marriage might be open to question, their Lordships thought it expedient that the matter should be set at rest by legislative declaration.

[*Authorities.*—Codes, etc., cited in the foregoing article; the Charter of Justice is printed in Clark's *Colonial Law*; the reports of Austin and Lewis will be found in Parl. Papers, 1837–38; see also Colonial Office List.]

Malt Tax.—In the year 1715 an Act was passed for, among other things, charging and continuing the duties on malt (1 Geo. 1. stat. 2, c. 2). This Act, with various amendments, continued in force until the year 1880, when by the Inland Revenue Act of that year (43 & 44 Vict. c. 20) the excise and customs duties on malt were repealed and the malt tax was abolished. The duties were to cease as from the 1st of October 1880. By sec. 3 of the Inland Revenue Act, 1880, it is enacted that "the following duties of excise shall cease to be charged and payable; (that is to say) the duties on malt; the duty on sugar used by any brewer of beer for sale in the brewing or making of beer, or in the preparation therefrom of any liquor or substance to be used as colouring in the brewing or making of beer; the duties on licences to be taken out by—a maltster or maker of malt, a roaster of malt, a dealer in roasted malt, and a brewer of beer for sale; and the drawbacks of excise now payable on malt and beer shall cease to be allowed." By sec. 4 customs duties on malt were repealed. By sec. 5 and subsequent sections special provision was made for the repayment to malt traders of duty paid for any portion of the period during which by the repealing Act the duty was not payable.

Malversation.—See OFFICE.

Manager—A person appointed to manage and carry on a particular business. In the case of a company, the directors usually have power to appoint a manager, but a mere power to make such an appointment does not authorise the directors to transfer to such manager powers expressly given by the articles to themselves; the only powers which in the general case they can delegate are those which belong to the management of the ordinary commercial business of the company (per Mellish, L.J., in *In re County Palatine Loan and Discount Co., Cartmell's* case, 1874, L. R. 9 Ch.

695). The manager of a company cannot retain to himself any pecuniary benefit obtained by him in his character of manager not known to, and not sanctioned by, the shareholders who employed him and whose interests he is bound to consult (per Lord Romilly, M. R., in *General Exchange Bank* v. *Horner*, 1870, L. R. 9 Eq. 480, 488); he is liable for misfeasance (Companies Winding-up Act, 1890, s. 10). In a winding up a special manager may be appointed by the Court on an application by the official receiver (*ibid.* s. 5). See COMPANY; DEBENTURE; RECEIVER.

Managium—A mansion-house or dwelling-place.

Manche Present—A bribe; a present from the donor's own hand.

Mandamus.

TABLE OF CONTENTS.

NATURE OF THE PREROGATIVE WRIT OF MANDAMUS 92
Definition 92
Early History 93
General Nature of the Writ . 93
Scope of the Writ 93
Immunity for Acts done under Writ 94
PRINCIPLES UPON WHICH MANDAMUS IS GRANTED 94
Issue of Writ discretionary . 94
Legal Right to Performance of Duty 94
Imperative Duty 96
Duty of a Public Nature . . 97
Refusal to perform Duty . . 97
No other adequate Legal Remedy . 97
Mandamus must be effectual . 99
PURPOSES FOR WHICH MANDAMUS IS GRANTED 99
General 99
Mandamus to Inferior Tribunals 99
Mandamus to Public Bodies and Officials 101
Mandamus for Election, Admission, and Restoration to Offices . 104
PROCEDURE TO OBTAIN MANDAMUS 105
Time for Application . . . 105
Application for Order Nisi . 105
The Order Nisi 106
Notice 106
Showing Cause against Order Nisi 107
Discharge of Order Nisi . . 107
Order Absolute 107
The Writ 108
Service of Writ 109
Quashing Writ 109
The Return 109
Pleadings, Trial, and Subsequent Proceedings 110
Appeal 111
Costs 111
MANDAMUS UNDER STATUTORY AUTHORITY 112
Mandamus to take Evidence in India and Colonies . . 112
Action for Mandamus . . 112
Interlocutory Order for Mandamus 113
RULES OR ORDERS IN THE NATURE OF MANDAMUS 113
Rule to Justices 113
Rule to Revising Barrister . . 114
Order to Coroner . . . 114
Order to County Court Judge . 114

NATURE OF THE PREROGATIVE WRIT OF MANDAMUS.—*Definition.*—The prerogative writ of mandamus has been defined by Blackstone as a command issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior Court of Judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice (see Black. *Com.* bk. iii. p. 110; see also PREROGATIVE WRITS).

The writ of mandamus now issues from the Crown side of the Queen's Bench Division of the High Court of Justice. Its general object is to

enforce the performance of some duty of a public nature in respect of which there is no other specific legal remedy.

It is to be observed that the prerogative writ of mandamus is a remedy that can be granted only in the Queen's Bench Division, and this notwithstanding the provisions of sec. 25 of the Judicature Act, 1873 (see *Glossop* v. *Heston and Isleworth Local Board*, 1878, 12 Ch. D. 102, per Brett, L.J., *ibid.* at p. 122; but see *In re Paris Skating Rink Co.*, 1877, 6 Ch. D. 731).

Early History.—The term "mandamus" was originally applied generically to a number of ancient writs, letters missive, or mandates, issued by the sovereign, directing the performance of certain acts. These were not judicial writs, but merely commands issuing from the sovereign direct, without the intervention of the Courts, and are now obsolete. The term mandamus derived from them has gradually become confined in its application to the judicial writ, which is now known as the high prerogative writ of mandamus (see Tapping on *Mandamus*, ch. i.; High, *Treatise on Extraordinary Legal Remedies*, ch. i. s. 2).

The early history of the prerogative writ of mandamus is obscure, but there is no doubt that the writ is of great antiquity, and was at an early period recognised as an institution of the common law. It appears to have been in use as early as the reign of Edward II. (see *Dr. Widdrington's* case, 1661, 1 Lev. 23; see also per Mansfield, C.J., *R.* v. *Askew*, 1768, 4 Burr. 2186; and per Powis, J., *R.* v. *Heathcote*, 1711, 10 Mod. at p. 57), though *Bagg's* case (1616, 11 Rep. 93) in the reign of James I. has been sometimes incorrectly cited as the earliest instance of a mandamus (see *R.* v. *Heathcote*, 1711, 10 Mod. at p. 57). It does not, however, appear to have been of frequent use until the latter part of the seventeenth century, at which period it was first systematically applied "as a corrective of official inaction, and for the purpose of setting in motion inferior tribunals and officers" (see High *Extraordinary Legal Remedies*, ch. i. s. 2). This, indeed, fairly epitomises its modern uses.

General Nature of the Writ.—Mandamus is a high prerogative writ (see *Knipe* v. *Edwin*, 1695, 4 Mod. 281; *R.* v. *Barker*, 1762, 1 Black. W. 352; *R.* v *Bishop of Chester*, 1786, 1 T. R. 396; *R.* v. *University of Cambridge*, 1765, 1 Black. W. 546; *R.* v. *The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.) 611; see also PREROGATIVE WRITS). It is not a writ of right, and does not issue of course (see the cases cited above; see also *R.* v. *The Commissioners of Excise*, 1788, 2 T. R. at p. 385; *R.* v. *Clear*, 1825, 4 Barn. & Cress. 901; *R.* v. *Paddington Vestry*, 1829, 9 Barn. & Cress. 461). The Court must, in fact, be satisfied that they have ground upon which to grant it, for it will not be granted merely for asking (see *R.* v. *Askew*, 1768, 4 Burr. 2186). The writ is in its nature a writ of restitution, and is of a most extensive and remedial character (see *Calvin's* case, 1609, 7 Rep. at p. 20; *R.* v. *St. John's College, Cambridge*, 1694, 4 Mod. at p. 234; *R.* v. *The Justices of the West Riding*, 1834, 3 Nev. & M. at p. 88; see also Black. *Com.* bk. iii. p. 110).

Scope of the Writ.—The purposes to which the extraordinary remedy by mandamus has been applied are of great diversity, and in process of time have been gradually and widely extended.

With regard to the scope of the writ, Lord Mansfield, C.J., said: "A mandamus is certainly a prerogative writ flowing from the king himself, sitting in this Court (the Court of King's Bench), superintending the police and preserving the peace of this country, and will be granted wherever a

man is entitled to an office or a function, and there is no other legal remedy for it. Where there is a right to execute an office, perform a service or exercise a franchise, more especially if it be in a matter of public concern or attended with profit, and a person is kept out of possession or dispossessed of such right and has no other specific legal remedy, the Court ought to assist by a mandamus" (see *R.* v. *Barker*, 1762, 1 Black. W. at p. 352; and *s. c.*, 3 Burr. at p. 1266). Again, in the course of a judgment in another case, Lord Mansfield said: "There is no doubt that where a party who has a *right* has *no other* specific legal remedy, the Court will assist him by issuing this prerogative writ in order to his obtaining such right" (*R.* v. *Askew*, 1768, 4 Burr. at p. 2188; see also *R.* v. *University of Cambridge*, 1765, *ibid.* 552; *R.* v. *Bishop of Chester*, 1786, 1 T. R. 396; *R.* v. *The Marquis of Stafford*, 1790, 3 T. R. 646).

The reason, it has been said, why writs of mandamus are granted is to prevent a failure of justice, and for the execution of the common law or of some statute or of the king's charter, and never as a private remedy to the party (see per Lord Hardwicke, C.J., *R.* v. *Wheeler*, 1735, Lee *t.* Hard. 99). When there is no other remedy equally convenient, the proper remedy is by mandamus; on this principle a peremptory mandamus was granted to a Returning Officer to countermand the poll at a County Council election, one of the candidates having died after nomination (*R.* v. *Stewart*, [1898] 1 Q. B. 552).

Instead, as was said in one case, of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, it is the duty of the Court to be vigilant to apply it in every case to which by any reasonable construction it can be made applicable (see per Martin, B., *The Mayor, etc., of Rochester* v. *The Queen*, 1858, 27 L. J. Q. B. 434).

Immunity for Acts done under Writ.—It is only reasonable that an individual should not be prejudiced by any act done by him under compulsion of law in compliance with a writ of mandamus. Such immunity is in fact now secured by rule 72 of the Crown Office Rules, 1886, which provides that no action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a writ of mandamus issued by the Supreme Court or any judge thereof (this rule is taken from the Statute 6 & 7 Vict. c. 67, s. 3, which is now repealed).

PRINCIPLES UPON WHICH MANDAMUS IS GRANTED.—*Issue of Writ discretionary.*—It has been mentioned that mandamus is an extraordinary remedy. It is most important also to observe that the granting or refusing of the prerogative writ is discretionary, and the Court, in the exercise of that discretion, may grant or refuse the writ entirely on the special circumstances of the particular case (see per Cockburn, C.J., *R.* v. *Garland*, 1870, L. R. 5 Q. B. at p. 272; see also *R.* v. *The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.) 611; *R.* v. *Littledale*, 1882, 12 L. R. Ir. Q. B. at pp. 100, 101). But the exercise of this judicial discretion in the granting or refusal of a mandamus is in no sense arbitrary, for it is in every case based upon certain determinate principles which have been evolved and defined by the practice of nearly three centuries; moreover, the discretion is now subject to review on appeal.

Legal Right to Performance of Duty.—To support an application for mandamus it is absolutely essential that there should be a legal right on the part of the applicant to the performance of some duty of a public nature by

the party against whom he applies. It has been clearly laid down that the existence of a legal right or obligation is the foundation of every writ of mandamus (see per Lord Campbell, C.J., *Ex parte Napier*, 1852, 18 Q. B. at p. 695; see also *R.* v. *The Bishop of Exeter*, 1802, 2 East, at p. 466; *R.* v. *Hertford College*, 1878, 3 Q. B. D. at p. 701; *R.* v. *Littledale*, 1882, 12 L. R. Ir. Q. B. at p. 101). The specific legal duty enforceable by mandamus may be one imposed by common law or custom (see *R.* v. *The Master and Wardens of the Company of Surgeons*, 1759, 2 Burr. 892; *R.* v. *Field*, 1791, 4 T. R. 125; *R.* v. *Mayor, etc., of West Looe*, 1825, 3 Barn. & Cress. at p. 684; *Ex parte Blackmore*, 1830, 1 Barn. & Adol. 122; *R.* v. *Hale*, 1838, 9 Ad. & E. 339), by charter, or by statute (see *R.* v. *Wheeler*, 1735, Lee. *t.* Hard. 99; *Simpson* v. *Scottish Insurance Co.* 1863, 1 H. & M. at p. 629). The right must be a legal right; a right of an equitable nature is not enforceable by mandamus (see *R.* v. *Godolphin*, 1838, 8 Ad. & E. 338; see also *R.* v. *The Marquis of Stafford*, 1690, 3 T. R. at p. 651; *R.* v. *Collector of Customs*, 1813, 2 M. & S. 223; *R.* v. *Orton*, 1851, 14 Q. B. 139; *R.* v. *The Trustees of Balby Turnpike Road*, 1853, 22 L. J. Q. B. 164).

The existence of a legal duty the performance of which is sought to be enforced, being essential to an application for a mandamus, it follows that where there is no legal obligation to do a particular thing, a mandamus will not be granted to compel it to be done (see, for instance, *R.* v. *The Great Western Rwy. Co.*, 1893, 62 L. J. Q. B. 572).

A mandamus, therefore, will not lie against the Secretary of State for War to compel him to carry out the terms of a Royal warrant regulating the pay and retiring allowances of officers and soldiers of the army, no legal duty in relation to such officers or soldiers being imposed upon him either at common law or by statute (*R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326). So in the case of one of the Inns of Court or of a College capriciously refusing to admit an individual as a member, a writ of mandamus will not lie, for there is no breach of any legal right (see *R.* v. *The Benchers of Lincoln's Inn*, 1825, 4 Barn. & Cress. 855; *R.* v. *The Principal and Ancients of Barnard's Inn*, 1836, 5 Ad. & E. 17). Nor will a mandamus be granted against a railway company compelling them to carry their railway by means of a bridge over a public footpath which it crosses, or the footpath over the railway, no such duty being imposed upon them by the Railways Clauses Consolidation Act, 1845 (*R.* v. *The Bexley Heath Rwy. Co.*, [1898] App. Cas. (H. L.) 210). On the same principle also, a mandamus to compel a railway company to reinstate the railway was refused, where the company was under no legal obligation either to maintain or to reinstate the railway (see *R.* v. *The Great Western Rwy. Co.*, 1893, 62 L. J. Q. B. 572; see also *R.* v. *The East and West India Dock Co.*, 1889, 60 L. T. 232).

It must, indeed, be affirmatively shown by the applicant that he has a specific legal right to the performance of the public duty which he asks the Court to order to be performed. Where, for instance, a Metropolitan District Board of Works, which was the sanitary authority of the district, applied for a mandamus to the Guardians of the Poor of the district, commanding them to enforce the provisions of the Vaccination Acts, it was held that the Board of Works had no legal specific right to enforce the performance by the Guardians of their duties, and therefore were not entitled to a mandamus (*R.* v. *The Guardians of Lewisham Union*, [1897] 1 Q. B. 498).

The object of a mandamus is to compel the performance of a duty. It will be granted when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done (see per Lord

Campbell, C.J., *Ex parte Nash*, 1850, 15 Q. B. at p. 95); so a mandamus to compel a company to take its seal off the register of shareholders, on the ground that it was affixed without authority and contrary to the provisions of the Companies Clauses Consolidation Act, 1845, was refused (*ibid.* p. 92).

Imperative Duty.—The duty which is to be enforced by mandamus must be an imperative duty. A mere discretionary power not amounting to an absolute duty will not be enforced by mandamus (see *R.* v. *Mayor of West Looe*, 1824, 5 Dow. & Ry. 414; *R.* v. *Kensington*, 1848, 12 Q. B. 654; *In re Heward*, 1845, 2 Dow. & L. 753; *R.* v. *The Bishop of Chichester*, 1859, 2 El. & El. 209; *R.* v. *Newport Bridge*, 1859, *ibid.* 377; *R.* v. *Vestry of St. Luke's, Chelsea*, 1862, 31 L. J. Q. B. 50).

With reference to the existence of an imperative legal duty there is an express decision of the House of Lords to the effect that the words in a statute, "it shall be lawful," of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only, but there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it (see *Julius* v. *The Bishop of Oxford*, 1880, 5 App. Cas. (H. L.) 214). Thus, where a bishop has a discretion as to whether he will issue a commission to inquire into the truth of a complaint under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 3, no mandamus will lie to compel him to do so (*ibid.*; see also *R.* v. *The Bishop of Oxford*, 1879, 4 Q. B. D. 525).

On the same principle also, where a railway company has an option when its line crosses a highway either to carry the road over the railway or the railway over the road, a mandamus will not be granted to compel the company to do one of these two things, unless circumstances which establish the impossibility of the company exercising the option are clearly shown (see *R.* v. *The Directors of the South-Eastern Rwy. Co.*, 1853, 4 H. L. 471).

When a duty is of a judicial nature a mandamus to enforce its performance will only lie in cases where the performance of it has been refused, and not merely where it has been improperly performed. The Court cannot dictate by mandamus the judgment which another Court shall give (see *R.* v. *The Justices of Middlesex*, 1839, 9 Ad. & E. at p. 546). For if the law requires a certain thing to be done, the party upon whom the obligation is imposed may be ordered to do it. If he is to act according to his discretion, and he will not act or even consider the matter, he may, by mandamus, be compelled to put himself in motion to do the thing, but his discretion cannot be controlled (see *R.* v. *The Justices of the North Riding*, 1823, 2 Barn. & Cress. 291; see also *R.* v. *The Bishop of Litchfield*, 1733, 7 Mod. at p. 218; *R.* v. *The Bishop of Worcester*, 1815, 4 M. & S. 415; *R.* v. *Law*, 1857, 7 El. & Bl. 366; *Ex parte Cook*, 1860, 2 El. & El. 586). And where, therefore, persons exercising an inferior jurisdiction have, on a mistaken view of the law, refused to hear a case, the Court will compel them by mandamus to hear and decide it; but when they have heard and decided, their decision cannot be reviewed (see per Lord Campbell, C.J., *R.* v. *The Deputies of Freemen of Leicester*, 1850, 15 Q. B. at p. 674).

So a mandamus will not be granted to review a judgment on the ground that it was erroneous (see *Ex parte Morgan*, 1820, 2 Chit. 250; *R.* v. *Hewes*, 1835, 3 Ad. & E. 725); nor will a mandamus lie to restore the name of a medical practitioner which has been erased by the General Council of

Medical Education for due cause after proper inquiry (see *R.* v. *The General Council of Medical Education*, 1861, 3 El. & El. 525; *Ex parte Le Mert*, 1863, 4 B. & S. 582).

On the other hand, where a duty is purely ministerial in its character, the performance of the specific act can be compelled by mandamus.

Duty of a Public Nature.—The writ of mandamus is granted only for public purposes to compel the performance of public duties (see *R.* v. *The Bank of England*, 1819, 2 Barn. & Ald. at p. 622). The duty sought to be enforced by mandamus must be of a public nature, and the writ is never granted as a private remedy (see per Hardwicke, C.J., *R.* v. *Wheeler*, 1735, Lee *t.* Hard. 99). It was formerly considered that the writ would lie only to compel the performance of a ministerial duty, but it has been the settled practice for some time past to grant a mandamus to enforce the performance of any duty of a public nature (see *R.* v. *The Mayor, etc., of Fowey*, 1824, 2 Barn. & Cress. 596; *R.* v. *Payn*, 1837, 6 Ad. & E. at p. 399).

Refusal to perform Duty.—The party entitled to the performance of a duty must have made a demand for its performance, and compliance must have been refused, before a mandamus will be granted (see *R.* v. *The Bristol and Exeter Rwy. Co.*, 1843, 4 Q. B. 162). Whether or not there has been a refusal is in each case a question of fact (see per Lord Denman, C.J., *R.* v. *Commissioners of River Thames and Isis*, 1839, 8 Ad. & E. at p. 904; see also *R.* v. *Vestrymen of St. Margaret, Leicester*, 1839, *ibid.* 889).

Where an application for a mandamus is made by a person who has no interest in the performance of the duty, or who is not proceeding *bonâ fide* for the purpose of enforcing his rights, it will not be granted (see *R.* v. *The Liverpool, etc., Rwy. Co.*, 1852, 21 L. J. Q. B. 284).

No other adequate Legal Remedy.—The object of the prerogative writ of mandamus is to afford a legal remedy in cases where no other appropriate remedy exists, so that there is no other effective legal mode of enforcing the right (see *R.* v. *Montacute*, 1750, 1 Black. W. at p. 64; *R.* v. *University of Cambridge*, 1765, *ibid.* p. 552).

It is, therefore, a settled principle regulating the discretion of the Court in granting the writ that where another remedy exists which is equally convenient, beneficial, and effectual, a mandamus will not be granted (see *In re Barlow*, 1861, 30 L. J. Q. B. 271; *R.* v. *Lambourn Valley Rwy. Co.*, 1888, 22 Q. B. D. 463; *R.* v. *The Registrar of Joint-Stock Companies*, 1888, 21 Q. B. D. 131; *R.* v. *Commissioners of Inland Revenue*, 1884, 12 Q. B. D. 461).

The Court refused to grant a prerogative writ of mandamus to a local authority, a vestry, to repair and maintain a sewer vested in them, the proper proceeding being by action against the vestry (*R.* v. *St. Giles, Camberwell, Vestry*, 1897, 66 L. J. Q. B. 337; see also *R.* v. *Mayor of Hastings*, [1897] 1 Q. B. at p. 49).

A rule for a prerogative writ of mandamus is not the proper remedy for enforcing a statutory obligation which can be made the subject of an action (see *R.* v. *Lambourn Valley Rwy. Co.*, 1888, 22 Q. B. D. 463; see, however, *R.* v. *The London and North-Western Rwy. Co.*, [1894] 2 Q. B. 512).

Mandamus will not be granted in any case in respect of which an express and adequate remedy exists. Thus a mandamus will never be granted to enforce the general law of the land which may be enforced by action (see *Ex parte Robins*, 1839, 7 Dowl. 566). So in cases where an

action of debt (see *R.* v. *Hull and Selby Rwy. Co.*, 1844, 6 Q. B. 70), trover or detinue (*R.* v. *Hopkins*, 1841, 1 Q. B. 161), ejectment (*R.* v. *The Stainforth and Keadby Canal Co.*, 1813, 1 M. & S. 32; *R.* v. *The Lord of the Manor of Agarsdley*, 1836, 5 Dowl. 19), or *quare impedit* (*R.* v. *Orton*, 1849, 14 Q. B. at p. 146; see also *R.* v. *The Bishop of Chester*, 1786, 1 T. R. 396; *R.* v. *The Marquis of Stafford*, 1790, 3 T. R. at p. 651), would lie, and would afford a sufficient remedy, a writ of mandamus would not be granted. And where the applicant has the ordinary legal remedy of an execution, mandamus does not lie; so where an action had been brought and judgment entered against a company which appeared to have no assets, the Court refused to issue a mandamus commanding the company to pay the sum recovered and costs (*R.* v. *The Victoria Park Co.*, 1841, 1 Q. B. 288). Nor is a mandamus obtainable in cases where there is a remedy by distress (see *R.* v. *London and Blackwall Rwy. Co.*, 1845, 3 Dow. & L. 399).

On the same principle also, where an information in the nature of a *Quo Warranto* is available, the writ of mandamus will not be granted (see *R.* v. *Mayor, etc., of Oxford*, 1837, 6 Ad. & E. 349; *R.* v. *Mayor, etc., of Winchester*, 1837, 7 Ad. & E. 215; *R.* v. *Councillors of Derby*, 1837, *ibid.* 419; *R.* v. *Phippen and Ricketts*, 1838, *ibid.* 966); nor can it be obtained in cases in which petition of right is an available remedy (see *R.* v. *Commissioners of Customs*, 1836, 5 Ad. & E. 380; see also *R.* v. *The Commissioners of Inland Revenue, In re Nathan*, 1884, 12 Q. B. D. 461). And where a remedy is open to an applicant by appeal, mandamus will not lie (see *R.* v. *Smith*, 1873, L. R. 8 Q. B. 146; see also *R.* v. *The Churchwardens of Weobley*, 1745, 2 Stra. 1259; *R.* v. *The Justices of the West Riding*, 1834, 1 Ad. & E. 606). As to the circumstances under which a mandamus will be granted in cases where there is an appeal to the visitors of a university, college, or cathedral, or other spiritual or eleemosynary institution, see *R.* v. *Patrick*, 1666, 2 Keb. 65 and 164; *R.* v. *Apleford*, 1671, *ibid.* 861; *Parkinson's* case, 1689, 3 Mod. 265; *R.* v. *Bishop of Chester*, 1727, 2 Stra. 797; *R.* v. *St. Catherine's Hall*, 1791, 4 T. R. 233; *R.* v. *Worcester*, 1815, 4 M. & S. 415; *R.* v. *Dean and Chapter of Chester*, 1850, 15 Q. B. 513; *R.* v. *Hertford College*, 1878, 3 Q. B. D. 693.

When a company had improperly refused to register a transfer of shares, a rule *nisi* for a prerogative writ of mandamus to compel the company to register the transfer having been granted, it was held that the prosecutor having another specific and sufficient remedy by action of mandamus, the prerogative writ ought not to issue, and the rule was discharged (*R.* v. *Lambourn Valley Rwy. Co.*, 1888, 22 Q. B. D. 463; see also *R.* v. *East and West India Dock Co.*, 1889, 60 L. T. at p. 236). But the Court will not refuse to grant a prerogative writ of mandamus in every case in which an action of mandamus would lie (see *R.* v. *London and North-Western Rwy. Co.*, [1894] 2 Q. B. 512; see also *Ex parte Page*, 1897, 14 T. L. R. 61). As to mandamus to a company to compel them to register a shareholder, see *R.* v. *Charnwood Forest Rwy. Co.*, 1884, 1 C. & E. 419.

An application for a mandamus to the Charity Commissioners to hear and determine a matter relating to the refusal by the governing body of a charity managed under a scheme authorised by the Charity Commissioners to accept the nomination of a person to be a member of the council of that governing body, was held not to be a just and convenient course, the proper remedy being by an application to a judge at chambers under the Charitable Trusts Act, 1853, s. 28 (*R.* v. *Charity Commisioners*, [1897] 1 Q. B. 407).

Notwithstanding the existence of another remedy, mandamus may in some cases be obtained if the other remedy is not adequate or complete.

And where, though a remedy was provided under a local Act of Parliament, the procedure and remedy was uncertain, inconvenient, and practically obsolete, it was held that a mandamus was applicable and ought to be granted (see *R.* v. *The Vestry of St. George the Martyr, Southwark*, 1892, 61 L. J. Q. B. 398). A mandamus may also be granted in cases where there is doubt as to whether or not an action would lie (see *R.* v. *Nottingham Old Waterworks*, 1837, 6 Ad. & E. 355). And in a case in which an election petition would lie, a peremptory mandamus has been granted as being a more convenient, speedy, and effective remedy (*R.* v. *Stewart*, [1898] 1 Q. B. 552).

The Court will not, as a general rule, grant a mandamus to compel the doing of an act the omission to do which may be prosecuted by indictment; where, therefore, the proper remedy is by indictment, a mandamus cannot usually be obtained (see *R.* v. *Bristow*, 1795, 6 T. R. 168; *R.* v. *Jeyes*, 1835, 3 Ad. & E. 416); but under some circumstances, as where an indictment would be inconvenient, ineffectual, or inadequate, a mandamus will be issued notwithstanding that a remedy by indictment exists (see *R.* v. *The Commissioners of Dean*, 1813, 2 M. & S. 80; *R.* v. *The Severn and Wye Rwy. Co.*, 1819, 2 Barn. & Ald. 646; *R.* v. *Payn*, 1837, 6 Ad. & E. 392; *R.* v. *Bristol Dock Co.*, 1841, 2 Q. B. 64; *R.* v. *The Treasurer of Oswestry*, 1848, 12 Q. B. 239).

Mandamus must be effectual.—Whenever the issue of a writ of mandamus would be nugatory, or where it is clear that the writ if granted would be ineffectual to secure the performance of the duty sought to be enforced, the writ will not be issued (see *In re The Bristol and North Somerset Rwy. Co.*, 1877, 3 Q. B. D. 10; see also *R.* v. *Griffiths*, 1822, 5 Barn. & Ald. 731; *R.* v. *The Justices of Pembrokeshire*, 1831, 2 Barn. & Adol. 391; *R.* v. *The Trustees of Northwich Savings Bank*, 1839, 9 Ad. & E. 729).

Purposes for which Mandamus is granted.—*General.*—The general object of the writ of mandamus, as has been seen, is to enforce the performance of duties of a public nature. The more important cases to which mandamus is applicable are those in which it is necessary to compel the proper exercise of jurisdiction of the inferior Courts and tribunals, to enforce the performance of duties by public bodies and public officers, and to compel the election, admission, or restoration to offices and franchises of a public nature. The general principles which regulate the granting of a mandamus, and the nature of the duties which are capable of being enforced by means of the writ, have already been briefly considered. It is necessary here to give some short account of the various classes of cases in respect of which the writ is the appropriate remedy.

Mandamus to Inferior Tribunals.—A most important object effected by means of the writ of mandamus is to enforce the due exercise by the judges of inferior tribunals of the judicial or ministerial powers with which they are invested. A mandamus to hear and determine a case will be granted against the judge of an inferior Court who has refused to exercise his jurisdiction, either by actually refusing to hear a case, or by wrongly deciding a preliminary point of law, so that the case was not heard on its merits (see *R.* v. *The Justices of Gloucestershire*, 1830, 1 Barn. & Adol. 1; *R.* v. *Richards*, 1851, 20 L. J. Q. B. 351; *R.* v. *The Justices of the West Riding*, 1883, 11 Q. B. D. 417). An inferior Court may by mandamus be compelled to exercise the jurisdiction which it possesses, but the mode of exercise

of such jurisdiction will not be dictated or interfered with by mandamus. And where an inferior tribunal has once exercised its jurisdiction by hearing and deciding a case, a mandamus will not be granted to compel the rehearing of the case, nor will a mandamus lie to review the decision by way of appeal, however erroneous the decision may be (see *R.* v. *The Justices of the West Riding*, 1834, 1 Ad. & E. 563; *Ex parte Smyth*, 1835, 3 Ad. & E. 719; *R.* v. *The Lords Commissioners of the Treasury*, 1839, 10 Ad. & E. 179; *R.* v. *Lord and Steward of the Manor of Old Hall*, 1839, *ibid.* 248; *R.* v. *The Justices of Middlesex*, 1877, 2 Q. B. D. 516; *Julius* v. *The Bishop of Oxford*, 1880, 5 App. Cas. 214; *R.* v. *King*, 1888, 20 Q. B. D. 430).

But the discretion of the inferior tribunal must be exercised *bonâ fide*, and not arbitrarily or improperly (see *R.* v. *The Justices of Cumberland*, 1836, 4 Ad. & E. 695; *R.* v. *Fawcett and Others*, 1868, 19 L. T. N. S. 396; *R.* v. *Adamson*, 1876, 1 Q. B. D. 201; *R.* v. *King*, 1888, 20 Q. B. D. 430).

If a proper discretion has been exercised it will not be interfered with; so where justices entertain an application for a summons for a criminal offence, and have considered the materials upon which the application is based, and refused to hear more or to grant a summons, a mandamus will not be granted to order them to hear it again (*Ex parte Macmalion*, 1883, 48 J. P. 70; see also *Ex parte Reid*, 1885, 49 J. P. 600; and *R.* v. *Huggins*, 1891, W. N. 88).

Where a magistrate has made a finding on a question of fact, he will not be compelled to state a case under 20 & 21 Vict. c. 43 (see *R.* v. *Sheil*, 1884, 50 L. T. 590). And a mandamus will not be issued to compel justices to hear and determine a case upon which after hearing evidence they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible (*R.* v. *Justices of Yorkshire, Ex parte Gill*, 1885, 53 L. T. 728).

On the other hand, where justices refuse to issue a summons, and it is evident that they have not exercised a discretion, a mandamus will lie (see *R.* v. *Adamson*, 1875, 1 Q. B. D. 201). And where an erroneous construction has been placed upon a statute by justices, so that they refuse an application under the statute, on the ground that they have no jurisdiction, the true construction of the statute being, in fact, to give them jurisdiction, a mandamus will be granted to hear and determine the matter (see *R.* v. *Cloete*, 1890, 64 L. T. 90).

It is frequently difficult to ascertain whether or not a proper discretion has been exercised. It is clear that the Queen's Bench Division cannot review the discretion of the justices if they have really and *bonâ fide* exercised that discretion, although their judgment may be wrong in law or in fact as to whether a legal offence has been made out (see *R.* v. *Byrde*, 1890, 60 L. J. M. C. at p. 19). The effect of the cases appears to be that if, on the application for a summons for an indictable offence, the justices have heard and determined the application, and on the merits have declined to grant it, the Court will not grant a mandamus to compel them to review their decision; but, on the other hand, if they have refused to hear the application, or if, after hearing, have refused to grant it, from a mistaken view of their duty amounting to a declining of jurisdiction, a mandamus may be granted (see *R.* v. *Fawcett*, 1868, 19 T. R. 396; *Ex parte Lewis*, 1888, 21 Q. B. D. 191; *R.* v. *The Mayor of Wisbech*, 1890, 7 T. R. 21; *R.* v. *Byrde*, 1890, 60 L. J. M. C. 17).

As to mandamus to compel Quarter Sessions to award licensing justices' costs of appeal to Quarter Sessions, see *R.* v. *The Justices of London*, [1895] 1 Q. B. 616; and see *R.* v. *Sharman*, [1898] 1 Q. B. 578.

As to mandamus to compel a metropolitan police magistrate to hear and determine a summons under the London Building Act, 1894, see *R.* v. *Mead, Ex parte The London County Council* (1897, 77 L. T. 462).

The writ of mandamus has been issued to compel the exercise of jurisdiction or performance of judicial or ministerial duties by the judges of the County Courts, the Ecclesiastical Courts, Courts Leet and Courts Customary, Revising Barristers, Metropolitan Police Magistrates, Stipendiary Magistrates, Justices at Quarter Sessions or Petty Sessions, Licensing Justices, and Justices of the Peace exercising their summary jurisdiction, and other inferior tribunals.

Under modern legislation a rule in the nature of a mandamus has been substituted for the prerogative writ of mandamus as the usual mode of enforcing the performance by County Court judges and justices of the peace (see *post*, under the head *Rules or Orders in the Nature of Mandamus*).

The writ of mandamus does not, however, lie to any of the superior Courts (see *The Rioters'* case, 1683, 1 Vern. 175; *R.* v. *Oxenden*, 1692, 1 Show. 218), to the Privy Council (see *Ex parte Smyth*, 1835, 3 Ad. & E. 719), to the Assize Courts (see *Ex parte Fernandez*, 1861, 10 C. B. N. S. 3), or to the Central Criminal Court (see *R.* v. *The Judges and Justices of the Central Criminal Court*, 1883, 11 Q. B. D. 479). So where, on the trial and conviction of a prisoner for larceny, the Recorder of London having refused to make an order under the Larceny Act, 1861 (24 & 25 Vict. c. 95, s. 100), for the restoration of the stolen property, the Queen's Bench Division refused to grant a mandamus to compel him to make such an order (*ibid.*). Nor has the Queen's Bench Division jurisdiction to interfere by mandamus with the internal affairs of Convocation, so that a mandamus will not be granted to an archbishop as president of Convocation (see *R.* v. *The Archbishop of York*, 1888, 20 Q. B. D. 740).

It has, however, been held that a mandamus will lie to a Master of the Supreme Court to enforce a duty imposed upon him by a particular statute (*R.* v. *Master Manley Smith*, 1883, 12 Q. B. D. 481).

Mandamus to Public Bodies and Officials.—In cases where there is no other effectual remedy, the writ of mandamus is the proper means of enforcing the performance by various public bodies and officers of the duties with which they are by law invested.

Where, therefore, a corporation is under a positive duty to do an act, *e.g.* to affix its corporate seal, such duty will be enforced by mandamus (see *R.* v. *Beeston*, 1790, 3 T. R. at p. 594), but a mere discretionary power vested in a corporate body will not be interfered with (see *R.* v. *Bishop of Oxford*, 1880, 5 App. Cas. 214; *Ex parte Lee*, 1858, El. B. & E. 863). The writ will lie to a corporation aggregate, or to a corporation sole *e.g.* an archbishop or a bishop; though the Court has no jurisdiction to grant a mandamus to an archbishop in his capacity as head of Convocation (see *R.* v. *The Archbishop of York*, 1888, 20 Q. B. D. 740).

A mandamus also lies to compel municipal corporations to do acts which they are under a legal obligation to do, *e.g.* to proceed to elect the officers of the corporation (see *R.* v. *The Mayor of Kingston-upon-Hull*, 1723, 8 Mod. 209; case of *The Corporation of Scarborough*, 1743, 2 Stra. 1180; *R.* v. *The Mayor, etc., of Thetford*, 1807, 8 East, 270; *R.* v. *Mayor, etc., of London*, 1829, 9 Barn. & Cress. 1). As to mandamus to a mayor and corporation to compel them to receive and count votes, see *Pritchard* v. *Mayor, etc., of Bangor*, 1888, 13 App. Cas. (H. L.) 241.

With regard to municipal elections, there is express provision that, if a municipal election is not held on the appointed day or within the appointed time, or on the day next after that day, or the expiration of that time, or becomes void, the municipal corporation is not thereby dissolved or disabled from electing, but the High Court may, on motion, grant a mandamus for the election to be held on a day appointed by the Court (Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 70; as to the procedure to obtain a mandamus in such cases, see *ibid.* s. 225 (2)–(8)). As to mandamus to postpone a County Council election, see *R.* v. *Stewart*, [1898] 1 Q. B. 552. In the case of elections of local bodies under the Local Government Act, 1894, that Act contains provisions which, by providing another remedy, obviate the necessity of obtaining a mandamus to hold such elections (see Local Government Act, 1894, 56 & 57 Vict. c. 73, ss. 47 (5), 59 (5), and 80).

Railway companies and other public companies can be compelled by mandamus to do acts which they are under a legal obligation to do (see, for example, *R.* v. *The Birmingham and Gloucester Rwy. Co.*, 1841, 2 Q. B. 47; *R.* v. *The Bristol and Exeter Rwy. Co.*, 1843, 4 Q. B. 162; *R.* v. *The York and North Midland Rwy. Co.*, 1845, 14 L. J. Q. B. 277; *R.* v. *The Newmarket Rwy. Co.*, 1850, 15 Q. B. 702; *R.* v. *The Wycombe Rwy. Co.*, 1867, 8 B. & S. 259; *R.* v. *The Government Stock Investment Co.*, 1878, 3 Q. B. D. 442).

On the other hand, where such a company is not under a legal duty, but has merely a discretionary power with regard to a particular act, a mandamus will not, in accordance with the general principles already referred to, be granted.

A mandamus has in some cases been granted to universities and colleges, but where the matter has been properly adjudicated upon by the visitors, the writ will not lie (*R.* v. *St. John's College, Oxford*, 1693, 4 Mod. 260; *R.* v. *The Bishop of Chester*, 1727, 2 Stra. 797; *R.* v. *The Vice-Chancellor, etc., of Cambridge*, 1765, 3 Burr. 1647; *R.* v. *St. Catherine's Hall, Cambridge*, 1791, 2 T. R. 233; *R.* v. *The Chancellor, etc., of the University of Cambridge*, 1794, 6 T. R. at p. 104; *R.* v. *Vice-Chancellor of Oxford*, 1872, L. R. 7 Q. B. 471; *R.* v. *Hertford College*, 1878, 3 Q. B. D. 693).

Numerous other public bodies, such, for instance, as Local Boards, Poor Law Guardians, Churchwardens, Vestries, Commissioners of Sewers, Drainage, Tithe, Inclosure, and Income Tax Commissioners, County Councils, and the various local bodies created by the Local Government Act, 1894, may in proper cases be compelled by mandamus to the performance of their duties.

So also will the writ be granted against persons holding various public offices, such as officers of municipal corporations, parish officers, overseers, surveyors of highways, coroners, the Registrar of Joint-Stock Companies, returning officers, etc. For a detailed enumeration of the various public bodies and public officers against whom mandamus has been granted, reference should be made to the works of Tapping on *Mandamus*, and Shortt on *Mandamus*. The lord and the steward of a manor may be compelled by mandamus to admit copyhold tenants (see *Ex parte Page*, 1897, 14 T. L. R. 61).

A mandamus will be granted to compel the payment of a fixed sum of money, to which the applicant can show that he is entitled, and in respect of which there is no other legal remedy (see *R.* v. *The Treasurer and Directors of St. Katherine's Dock Co.*, 1832, 4 Barn. & Adol. 360; see also *R.* v. *Beeston*, 1790, 3 T. R. 592; *R.* v. *Mayor, etc., of Cambridge*, 1840,

12 Ad. & E. 702; *R.* v. *Mayor, etc., of Sandwich*, 1846, 10 Q. B. 563), but not in the case of an uncertain or unascertained sum (see *R.* v. *Clark*, 1844, 5 Q. B. 887).

The production of public documents, in the inspection of which the applicant is directly interested, can be compelled by mandamus (see *R.* v. *Lucas*, 1808, 10 East, 235; *R.* v. *Tower*, 1815, 4 M. & S. 162; *R.* v. *The Guardians, etc., of Great Faringdon*, 1829, 9 Barn. & Cress. 541; *R.* v. *Vestrymen of Marylebone*, 1836, 5 Ad. & E. 268; *R.* v. *The Justices of Staffordshire*, 1837, 6 Ad. & E. at p. 99). But production will not be ordered unless the applicant proves that he is directly and substantially interested (see *R.* v. *Clear*, 1825, 4 Barn. & Cress. 899; *R.* v. *Merchant Taylors Company*, 1831, 2 Barn. & Adol. 115; *R.* v. *The Justices of Staffordshire*, 1837, 6 Ad. & E. 84). Under the present practice, in cases where litigation is pending, discovery may be obtained (see DISCOVERY), and the use of mandamus in this respect is therefore limited to cases where the persons who have the custody of public documents are not parties, or where no litigation is pending.

A prerogative writ of mandamus is the proper remedy for enforcing the taking up of an award of compensation under the Lands Clauses Consolidation Act, 1845 (see *R.* v. *The London and North-Western Rwy. Co.*, [1894] 2 Q. B. 512).

As to mandamus to compel the alteration or correction of the burgess roll after revision, see the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 47 (2). It has been held that the Court has power to compel the performance of a public duty by public officers although the time prescribed by statute for its performance has passed, and if the public officer to whom belongs the performance of the duty has in the meantime quitted his office, and has been succeeded by another, it is the duty of the successor to obey the writ and to do the acts when required which his predecessor has omitted to perform (see *The Mayor, etc., of Rochester* v. *The Queen*, 1858, 27 L. J. Q. B. 434). A mandamus was in that case granted, directing the revision of the burgess lists after the statutory period for the revision had expired. (On the same principle, leave to amend a burgess roll after the time for revision had elapsed was also granted by Day, J., at chambers on an *ex parte* application, *In re Mayor, etc., of Wednesbury*, 22nd December 1897; *In re The Town Clerk of Eastbourne, Ex parte Keay*, 1891, 66 L. T. 323, is distinguishable; see also BURGESS ROLL; REGISTRATION; REVISING BARRISTER.)

In a case where an allowance in respect of income tax ought to have been granted, but was refused, it was held that a mandamus lies to the Income Tax Commissioners, commanding them to grant the allowance, and to give a certificate of the allowance, with an order for the payment thereof (*Income Tax Commissioners* v. *Pemsel*, [1891] App. Cas. (H. L.) 531; see also *R.* v. *Income Tax Commissioners*, 1888, 21 Q. B. D. 313).

In a recent case, a peremptory mandamus was granted to a Returning Officer to countermand the poll at a County Council election on account of the death of one of the candidates, he being under a statutory duty to do so (*R.* v. *Stewart*, [1898] 1 Q. B. 552).

The remedy by mandamus is, however, not available against the sovereign (see per Lord Denman, C.J., *R.* v. *Powell*, 1841, 1 Q. B. at p. 361; see also *In re De Bode*, 1838, 6 Dowl. P. C. 776). Nor can the writ of mandamus be granted against a party acting merely as officer or agent of the Crown (see *R.* v. *The Commissioners of Customs*, 1836, 5 Ad. & E. 380; *R.* v. *The Secretary of State for War*, [1891] 2 Q. B. 326).

The Courts have therefore refused to issue a mandamus to the Lords of the Admiralty (see *Ex parte Ricketts*, 1836, 4 Ad. & E. 999), the Commissioners of Customs (*R.* v. *The Commissioners of Customs*, cited *supra*), the Secretary of State for War (see *R.* v. *The Secretary of State for War*, cited *supra*), and the Lords of the Treasury (see *In re De Bode*, 1838, 6 Dowl. P. C. 776). A mandamus has, on the other hand, been granted against the Lords of the Treasury where they were under a statutory obligation to pay money to a particular person (see *R.* v. *The Lords Commissioners of the Treasury*, 1835, 4 Ad. & E. 286); but it is clear that a mandamus would not lie against them where they have received money which was granted to Her Majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable (see *R.* v. *The Lords Commissioners of the Treasury*, 1872, L. R. 7 Q. B. 387). A mandamus has, however, been granted against the Postmaster-General to assess compensation under the Telegraph Act, 1868 (*R.* v. *The Postmaster-General*, 1878, 3 Q. B. D. 428), and against the Local Government Board (*R.* v. *The Local Government Board*, 1874, L. R. 9 Q. B. 148; *R.* v. *The Local Government Board*, 1885, 15 Q. B. D. 70). And a mandamus will lie against the Registrar of Joint-Stock Companies, though an official of the Board of Trade, which is a Committee of the Privy Council, if he refuse to perform a mere ministerial act which he is under a statutory obligation to perform (see *R.* v. *Registrar of Joint-Stock Companies*, 1888, 21 Q. B. D. at p. 135).

Election, Admission, and Restoration to Offices.—The remedy by mandamus is frequently applied to compel the election, appointment, admission, or restoration to certain public offices and franchises. Thus the prerogative writ has been issued to compel election to corporate offices, such as those of mayor (*R.* v. *Mayor, etc., of Cambridge*, 1767, 4 Burr. 2008; *R.* v. *The Corporation of Bedford*, 1800, 1 East, 79), alderman (*R.* v. *The Mayor of Evesham*, 1732, 7 Mod. 166), town councillor (*R.* v. *The Mayor, etc., of Leeds*, 1838, 7 Ad. & E. 963), burgess (*R.* v. *The Mayor, etc., of Doncaster*, 1828, 7 Barn. & Cress. 630; *R.* v. *The Mayor of Monmouth*, 1821, 4 Barn. & Ald. 496; *R.* v. *The Mayor, etc., of Thetford*, 1807, 8 East, 270), poor law guardians (*R.* v. *The Mayor, etc., of Norwich*, 1830, 1 Barn. & Adol. 310), churchwardens and overseers (*R.* v. *D'Oyly and Others*, 1840, 12 Ad. & E. 139; *R.* v. *The Inhabitants of Wix*, 1831, 2 Barn. & Adol. 197), and numerous other offices. As to mandamus to compel municipal elections, see the Municipal Corporations Act, 1882, ss. 70 and 225 (2)–(8), referred to above under the head of *Mandamus to Public Bodies and Public Officials*. As to mandamus to a Returning Officer to postpone a County Council election on account of the death of one of the candidates, see *R.* v. *Stewart*, [1898] 1 Q. B. 552.

The appointment of masters of colleges and grammar schools (*R.* v. *The Bishop of Ely*, 1788, 2 T. R. 290; *R.* v. *The Archbishop of York*, 1795, 6 T. R. 490; *R.* v. *The Bishop of Lichfield*, 1735, 2 Stra. 1023), of chaplains of gaols and workhouses (*R.* v. *The Bishop of Bath and Wells*, 1843, 5 Q. B. 147; *R.* v. *Braintree*, 1841, 1 Q. B. 130), and of other officers of a public nature, such as surveyors of highways, parish clerks, etc., has been ordered by mandamus. And the same remedy has been used to enforce the admission to offices of persons entitled to the same, *e.g.*, to the offices of vicar, archdeacon, canon, perpetual curate, fellow or master of a college; to endowed lectureships and college fellowships; to various corporate offices, mayor, alderman, common councilman, sheriff, recorder, freeman

or liveryman of a company, etc. (see the cases collected in Tapping on *Mandamus* and in Shortt on *Mandamus*). By means of mandamus, also, a person may obtain restoration to a public office of which he has been wrongfully dispossessed (see per Lord Mansfield, C.J., in *R.* v. *Blooer*, 1760, 2 Burr. at p. 1045; see also the numerous cases collected in Shortt on *Mandamus*, ch. iv.).

But where a person is in actual possession of an office under a *bonâ fide* election, the legality of the election, and the consequent validity of the title to the office, cannot be tested by means of mandamus, the appropriate remedy in such cases usually being by *Quo Warranto* (see *R.* v. *The Mayor of Colchester*, 1788, 2 T. R. 259; *R.* v. *Hertford College*, 1878, 3 Q. B. D. 693; see also the article QUO WARRANTO). If, however, there is no remedy by *Quo Warranto* or otherwise, a mandamus will, under some circumstances, be issued for a new election (see *R.* v. *The Corporation of the Bedford Level*, 1805, 6 East, 356; *R.* v. *The Minister and Churchwardens of Stoke Damerel*, 1836, 5 Ad. & E. at p. 590; *R.* v. *The Rector and Churchwardens of Birmingham*, 1837, 7 Ad. & E. 254; *R.* v. *Hertford College*, 1878, 3 Q. B. D. at p. 704).

In the case of ecclesiastical offices, mandamus will lie where there is a temporal right, such as an endowment or other emolument attaching to the office (see *R.* v. *Blooer*, 1760, 2 Burr. at p. 1045), but not, apparently, where the office is purely spiritual in its functions and incidents, and is unconnected with any temporalities or emoluments (see Short and Mellor, *Cr. Off. Pr.* p. 22).

PROCEDURE TO OBTAIN MANDAMUS.—It is proposed here to give a brief view of the practice relating to mandamus. More detailed information must be sought in the authorities appended to this article.

Time for Application.—The application for a mandamus must in all cases be made within a reasonable time after the refusal to do the act in question.

If there has been unreasonable delay in applying for a mandamus, which cannot be explained, the writ will not be issued (see *R.* v. *The Stainforth and Keadby Canal Co.*, 1813, 1 M. & S. 32; *R.* v. *Leeds and Liverpool Canal Navigation*, 1840, 11 Ad. & E. 316; *R.* v. *Rochdale Turnpike Road Trustees*, 1848, 12 Q. B. 448).

On the other hand, the application if made prematurely will be refused (see *R.* v. *West Looe*, 1763, 3 Burr. 1386; *Ex parte Parkes*, 1841, 9 Dowl. 614; *R.* v. *Paddington Vestry*, 1829, 9 Barn. & Cress. 456).

An application under the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, for a mandamus to a mayor to insert applicant's name on the burgess roll must be made within two months after the last sitting of the revision Court (see *ibid.* s. 47 (2)).

In the case of an application for a writ of mandamus to justices to enter continuances and hear an appeal, the Crown Office Rules expressly require the application to be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time be allowed by the Court or a judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court (C. O. R. 1886, r. 79).

Application for Order Nisi.—Application for a prerogative writ of mandamus must during the sittings be made to a Divisional Court of the

Queen's Bench Division by motion for an order *nisi* (C. O. R. 1886, r. 60). It would seem that the Court still has power in its discretion to grant an order absolute in the first instance (see R. S. C. 1883, Order 52, r. 2, and Order 68, r. 2; see also Shortt on *Informations*, p. 361). During vacation application may be made to a judge in chambers for a summons to show cause, upon its being shown to the satisfaction of the judge that the matter is urgent (*ibid.*). But this does not apply to applications for mandamus under the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 225 (*ibid.*).

The application for a prerogative writ of mandamus must be made by counsel, and cannot be made by a party in person (see *Ex parte Wason*, 1869, 10 B. & S. 580; *R.* v. *Eardley*, 1885, 49 J. P. 551; *R.* v. *The Mayor, etc., of Liverpool*, 1891, 7 T. R. 592; *Ex parte Whyte*, 1896, 12 T. R. 458).

But although a prerogative writ of mandamus can only be moved by counsel, apparently a rule in the nature of a mandamus under the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, s. 5, may be moved for by an applicant in person (see *R.* v. *Eardley*, 1885, 49 J. P. 551; see also *R.* v. *Biron*, 1884, 14 Q. B. D. 474).

The application can only be made on behalf of a person who has a real interest in requiring the duty to be performed (see *R.* v. *Mayor of Peterborough*, 1875, 44 L. J. Q. B. 85).

No order for the issuing of any writ of mandamus will be granted unless at the time of moving, an affidavit be produced by which some person deposes on oath that the motion is made at his instance as prosecutor, and, if the writ be granted, the name of such person must be indorsed on the writ as the person at whose instance it is granted (see C. O. R. 1886, r. 76; see also *R.* v. *Mayor of Peterborough*, cited *supra*). Such affidavits should state the legal right of the applicant to the performance of the duty, the demand and refusal of performance, the giving of notice if it be necessary, and generally all facts necessary to establish a *primâ facie* case for relief.

The Order Nisi.—The order *nisi* when granted is drawn up at the Crown Office, and requires the party to whom it is directed to show cause why a writ of mandamus should not issue. Where several persons are under an obligation to perform the duty sought to be enforced, the rule *nisi* may include them all collectively. It may, for example, be directed to the churchwardens, overseers, or inhabitants of a parish, or to the justices of a county.

The order *nisi* must be served upon each person to whom notice is given by the order, as well as the party whom the order requires to show cause (C. O. R. 1886, r. 62). When the order is to justices of a county generally, it is sufficient to serve two or three of them (see Short and Mellor, *Cr. Off. Pr.* p. 39).

Notice.—Notice must be given by the order *nisi* for a mandamus to every person, who, by the affidavits on which the order is moved, shall appear to be interested in, or likely to be affected by, the proceedings, and to any person who in the opinion of the Court or judge ought to have such notice (C. O. R. 1886, r. 61).

In applications for mandamus to proceed to an election of a corporate officer, the applicant must give notice in writing of the application to the person to be affected thereby, at least ten days before the day, in the notice

specified for making the application (Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 225 (2); as to the procedure in such cases, see *ibid.* s. 225 (3)–(8)).

Showing Cause against Order Nisi.—The order *nisi* specifies a day for showing cause; before that date the motion must be entered in the Crown Paper for hearing. (As to the practice with regard to this, see Short and Mellor, *Cr. Off. Pr.* pp. 39 and 40.)

Any person, whether he has had notice or not, who can make it appear to the Court or judge that he is affected by the proceeding for a writ of mandamus, may show cause against the order *nisi* or summons, and is liable to costs at the discretion of the Court or judge if the order should be made absolute or the prosecutor obtain judgment (*ibid.* r. 63; see also *R.* v. *The Justices of Middlesex*, 1843, 2 Dowl. P. C. 719; *R.* v. *The Bishop of Ely*, 1750, 1 Black. W. 53).

The Crown Office Rules, however, provide that no person shall be allowed to show cause against an order *nisi*, unless he has previously obtained office copies of the order, and of the affidavits upon which it was granted (C. O. R. 1886, r. 26).

Affidavits in opposition to the motion should set forth all facts negativing the applicant's right to a mandamus. As to the practice with regard to the affidavits, see Crown Office Rules, 1886, rr. 5–27.

Discharge of Order Nisi.—If the applicant does not succeed in showing a case for a mandamus, and it should be recollected that the granting or refusing of the writ is discretionary, the order *nisi* will be discharged.

It has been decided that it is necessary to instruct counsel to discharge a rule *nisi*, whether in the Divisional Court or on appeal to the Court of Appeal (see *R.* v. *The Mayor, etc., of Liverpool*, 1891, 55 J. P. 823).

No second application can be made for a prerogative writ of mandamus after the first has been discharged.

A rule for a mandamus to compel a corporation to perform a statutory duty, having been discharged on the ground that no demand and refusal had taken place, the Court refused to grant another rule for a mandamus for the same purpose, although there had been a demand and refusal since the discharge of the former rule (*R.* v. *The Justices of Bodmin*, [1892] 2 Q. B. 21; following *Ex parte Thompson*, 1845, 6 Q. B. 721).

Order Absolute.—When no valid cause is shown against the order *nisi* it will on affidavit of service be made absolute. So also where the applicant makes out an undoubted case for relief by mandamus, the order *nisi* will be made absolute.

The order when made absolute is drawn up by the Master of the Crown Office. It must be drawn up with extreme care, the writ of mandamus itself having to follow the terms of the order absolute. The order absolute may on application before the issue of the writ of mandamus be amended, but an application to amend after the writ has issued is usually refused (but see *R.* v. *East Lancashire Rwy. Co.*, 1847, 16 L. J. Q. B. 127).

An appeal to the Court of Appeal, and subsequently to the House of Lords, lies against the granting of an order *nisi*, and also against an order absolute (see *R.* v. *The Mayor, etc., of Bangor*, 1886, 18 Q. B. D. 349; *s. c., sub nom. Pritchard* v. *Mayor, etc., of Bangor*, 1888, 13 App. Cas. (H. L.) 241).

The Writ.—The general form of the writ of mandamus is given in the Crown Office Rules, 1886 (Form No. 37), and is as follows:—

WRIT OF MANDAMUS.

VICTORIA, by the Grace of God, etc.

To of , greeting.

Whereas by [*here recite Act of Parliament, or Charter, if the act required to be done is founded on either one or the other*]. And whereas We have been given to understand and are informed in the Queen's Bench Division of Our High Court of Justice before Us that [*insert necessary inducement and averments*]. And you, the said were then and there required by [*insert demand*], but that you the said well knowing the premises, but not regarding your duty in that behalf then and there wholly neglected and refused to [*insert refusal*], nor have you or any of you at any time since in contempt of Us and to the great damage and grievance of , as We have been informed from their complaint made to Us. Whereupon We, being willing that due and speedy justice should be done in the premises as it is reasonable, do command you the said , and every of you, firmly enjoining you that you [*insert command*], or that you show Us cause to the contrary thereof, lest by your default the same complaint should be repeated to Us, and how you shall have executed this Our writ make known to Us in Our said Court at the Royal Courts of Justice, London, forthwith then returning to Us this Our said writ, and this you are not to omit.—Witness, etc.

To be indorsed.

By Order of Court [*or* of Mr. Justice].

At the instance of

This writ was issued by, etc.

A peremptory writ of mandamus must be in the same form, omitting the words "or that you show Us cause to the contrary thereof."

The Court or a judge may, if they or he think fit, order that any writ of mandamus shall be peremptory in the first instance (see C. O. R. 1886, r. 67; see also *R.* v. *Stewart*, [1898] 1 Q. B. 552). The grant of a peremptory mandamus is a decision upon a right declaring what is and what is not lawful to be done, and such decision is subject to review (see *R.* v. *The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.) 611; see also *Pritchard* v. *Mayor, etc., of Bangor*, 1888, 13 App. Cas. (H. L.) 241).

The writ must be in the above form with such variations as circumstances may require (see C. O. R. 1886, r. 68). There being great variety in the uses to which mandamus is applied, care must be used in adapting the form to particular cases. The writ should be settled by counsel, and is issued from the Crown Office.

For forms showing how the writ of mandamus may be applied to particular cases, *e.g.*, to elect a corporate officer, to administer a declaration on an election under the Municipal Corporation Acts, to justices to hear an appeal, to licensing justices to hear an application, to a railway company to summon a jury to assess compensation under the Lands Clauses Consolidation Act, to a railway company to take up an award under the same Act, to a lord and steward of a manor to admit a tenant, to guardians of the poor to allow inspection of their books, to overseers for contribution to a School Board, to the vicar, churchwardens, and inhabitants of a parish to elect

churchwardens, to a bishop to institute proceedings against a person in Holy Orders in respect of ecclesiastical offences, to the owners and proprietors of common and waste grounds under an Inclosure Act to convene a meeting, see Short and Mellor (*Cr. Off. Pr.* pp. 688–704).

Service of Writ.—Where the writ of mandamus is directed to one person only, the original must be personally served upon him, but if the writ be directed to more than one, the original must be shown to each one at the time of service, and a copy served on all but one, and the original delivered to such one (C. O. R. 1886, r. 65). When the writ is directed to companies, corporations, justices, or public bodies, service must be made upon such and so many persons as are competent to do the act required to be done, the original being delivered to one of them, except where by statute service on the clerk or other officer is made sufficient service (*ibid.* r. 66).

Quashing Writ.—The writ may on motion to the Court be ordered to be quashed on the ground that it is irregular, *e.g.* as being misdirected (see *R.* v. *Mayor, etc., of Hereford*, 1706, 2 Salk. 701), materially differing from the order absolute (*R.* v. *The Vestrymen, etc., of St. Pancras*, 1839, 11 Ad. & E. 27 *n.*; *R.* v. *Tucker*, 1824, 3 Barn. & Cress. 544), or not making out a sufficient case for relief (see *R.* v. *The Church Trustees of St. Pancras*, 1835, 3 Ad. & E. 535; *R.* v. *Hopkins*, 1841, 1 Q. B. 161; *R.* v. *Powell*, 1841, *ibid.* 352; *R.* v. *The Justices of the West Riding*, 1796, 7 T. R. 48). In some cases where there is a manifest fault in the writ, the Court may on motion grant a *supersedeas* (see *R.* v. *Beecher*, 1724, 8 Mod. 335).

The Return.—The writ of mandamus may be made returnable forthwith, or time may be allowed to return it either with or without terms, as the Court thinks fit (C. O. R. 1886, r. 68).

The return must, as a rule, be made by the persons to whom the writ is rightly addressed, and who are under the duty of obedience to it (see *R.* v. *The Town of Clitheroe*, 1705, 6 Mod. 133). If the mandamus is to a corporation, the return should be made by the majority of the corporation, with the concurrence of the mayor (see *R.* v. *The Borough of Abingdon*, 1691, 12 Mod. 308).

In some cases, however, the return is to be made by persons other than those to whom the writ is directed, the Crown Office Rules, 1886, providing that when it appears to the Court that the respondent claims no right or interest in the subject-matter of the application, or that his functions are merely ministerial, the return to the writ and all subsequent proceedings down to judgment are still to be made and proceed in the name of the person to whom the writ is directed, and, if the Court thinks fit so to order, may be expressed to be made on behalf of the persons really interested therein. In that case the persons interested are to be permitted to frame the return and conduct the subsequent proceedings at their own expense; and if judgment is given for or against the applicant, it must likewise be given for or against the persons on whose behalf the return is expressed to be made; and if judgment is given for them they are to have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases (C. O. R. 1886, r. 73). And where the return is so expressed to be made on behalf of some person other than the person to whom the writ of mandamus is directed, the proceedings on the writ are not to abate by reason of the death, resignation, or removal from office of that

person, but they may be continued and carried on in his name; and if a peremptory writ is awarded, it is to be directed to the successor in office or right of that person (*ibid.* r. 74; see also *The Mayor, etc., of Rochester* v. *R.*, 1858, El. B. & E. 1024).

Any person by law compellable to make any return to a writ of mandamus must make his return to the first writ (see C. O. R. 1886, r. 69).

The return may show that the prosecutor is not entitled to the relief sought by mandamus. This may be done by traversing the suggestion of the writ, by affirming certain additional facts, which in effect amount to a plea in confession and avoidance, or by showing that the writ on the face of it avers no legal right to the performance of the alleged duty. Or the return may be that the writ has been obeyed, the thing commanded having been done, or an excuse for non-compliance with the writ may be set forth on the return. It is the duty of the person to whom a mandamus is directed either to obey the writ or to return a cause for not obeying it (see *R.* v. *Stirling*, 1755, Say. at p. 175). The return may be that part of the mandatory clause has been obeyed, and that new facts which are set forth afford an answer to the rest (see *R.* v. *The Justices of Staffordshire*, 1837, 6 Ad. & E. 84). But when several causes are returned which are inconsistent, the whole return is bad (see *R.* v. *The Mayor, etc., of Cambridge*, 1788, 2 T. R. 456; *R.* v. *Mayor, etc., of York*, 1792, 5 T. R. 66; *R.* v. *Lord and Steward of the Manor of Old Hall*, 1839, 10 Ad. & E. 248). As to a return of unconditional obedience to the writ, see *R.* v. *The Licensing Justices of Pirehill* (1884, 14 Q. B. D. 13); *R.* v. *King and Others* (1888, 20 Q. B. D. 430). In the event of non-compliance with the mandatory clause in the writ, the return must be very minute in showing why the party did not obey (see *R.* v. *The Commissioners of the Port of Southampton*, 1861, 1 B. & S. 5; see also as to the sufficiency of a return, *R.* v. *Churchwardens of Taunton*, 1776, Cowp. 413; *R.* v. *The Ouse Bank Commissioners*, 1835, 3 Ad. & E. 544; *R.* v. *Round*, 1835, 4 Ad. & E. 139; *R.* v. *The Eastern Counties Rwy. Co.*, 1839, 10 Ad. & E. 531; *R.* v. *The Governors of St. Andrew, etc.*, 1839, *ibid.* 736; *R.* v. *The Great Western Rwy. Co.*, 1852, 1 El. & Bl. 253; *R.* v. *The Manchester and Leeds Rwy. Co.*, 1842, 3 Q. B. 528). But a return stating an excuse for non-compliance with a peremptory writ of mandamus is inadmissible; there cannot be any return to a peremptory writ except that it has been obeyed (see *R.* v. *Ledgard and Others*, 1841, 1 Q. B. 616; *R.* v. *Hudson*, 1845, 9 Jur. 345).

The return to a mandamus must be drawn with extreme care, the same certainty being required as in a return to a writ of *habeas corpus* (see *R.* v. *The Mayor, etc., of Carlisle*, 1722, 8 Mod. 99; *R.* v. *The Mayor of Lyme Regis*, 1779, 1 Doug. 149; see also the article HABEAS CORPUS). For form of return to writ of mandamus, see C. O. R. 1886, Form No. 138.

As to quashing the return for insufficiency, see *R.* v. *The St. Katherine's Dock Co.* (1832, 4 Barn. & Adol. at p. 363); see also *R.* v. *Payn* (1840, 11 Ad. & E. 955).

Pleadings, Trial, and Subsequent Proceedings.—When any return is made to the first writ of mandamus, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action, and (subject to the Crown Office Rules, 1886) this pleading and all subsequent proceedings, including pleadings, trial, judgment, and execution, are to proceed and may be had and taken as if in

an action (C. O. R. 1886, r. 136; see also *R.* v. *The Licensing Justices of Pirehill North*, 1884, 14 Q. B. D. 13). The mode of trial on a mandamus is the same as that of an ordinary action, and the R. S. C. 1883 are applicable.

Where a point of law is raised in answer to a return or any other pleading in mandamus, and there is no issue of fact to be decided, the Court must on the argument of the point of law give judgment for the successful party without any motion for judgment being made or required (C. O. R. 1886, r. 70). Where the applicant obtains judgment under this rule he is entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ, and the judgment must direct that a peremptory writ do issue (*ibid.* r. 71).

A special case may by consent of the parties, or by order of the Court or a judge, be stated at any stage of the proceedings, in which event further proceedings are stayed until the decision of the special case (see R. S. C. 1883, Order 34; C. O. R. 1886, rr. 140–142; for the practice, see Short and Mellor, *Cr. Off. Pr.* p. 60).

Disobedience to a peremptory writ of mandamus renders the party to whom it is directed liable to attachment (see ATTACHMENT; CONTEMPT OF COURT; see also EXECUTION).

Appeal.—Proceedings by mandamus being civil proceedings on the Crown side of the Queen's Bench Division, an appeal lies to the Court of Appeal, and thence to the House of Lords; the procedure on appeal is the same as in an ordinary action (see R. S. C. 1883, Order 58, r. 2, and C. O. R. 1886, r. 216; *R.* v. *Holl*, 1881, 7 Q. B. D. 575; *Julius* v. *The Bishop of Oxford*, 1880, 5 App. Cas. 214; *R.* v. *The Bishop of London*, 1889, 24 Q. B. D. 213; *R.* v. *The Bishop of London*, 1890, 7 T. R. 122).

Costs.—The costs of proceedings in mandamus, including the costs of the application whether the writ be granted or refused, and also the costs of the writ if issued, are entirely in the discretion of the Court (see C. O. R. 1886, r. 300; R. S. C. 1883, Order 65 and Order 68, r. 2; *R.* v. *Holl*, 1881, 7 Q. B. D. 575; see also the article COSTS). The costs, as a rule, are given to the party who is ultimately successful, though this rule is not inflexible (see *R.* v. *The Eastern Counties Rwy. Co.*, 1842, 2 Q. B. 569; *R.* v. *The Justices of Surrey*, 1846, 9 Q. B. 37; *R.* v. *The Justices of Surrey*, 1850, 14 Q. B. 684; *R.* v. *Harden*, 1854, 23 L. J. Q. B. 127; *R.* v. *Harding*, 1890, 6 T. R. 175).

On discharging a rule for a mandamus to justices to hear and determine an application under the Licensing Acts for a new licence, the High Court have jurisdiction to give costs both to the justices and to a successful respondent, and this jurisdiction is not affected by the decision in *Boulter* v. *The Justices of Kent*, [1897] App. Cas. (H. L.) 556. Where a person is properly served with a rule *nisi* for mandamus, and appears to show cause, and satisfies the Court of his substantial interest in the result of the argument, there is every reason for the exercise of a judicial discretion to award him costs (see *R.* v. *The West Riding Justices, Ex parte Shaw*, [1898] 1 Q. B. 503).

Every application for the costs of a mandamus must, unless otherwise ordered, be made before the fifth day of the sittings next after that in which the right to make such application accrued, and must be upon notice of motion to be served eight days before the day named therein for moving (C. O. R. 1886, r. 77). And the party moving for costs must leave at the

Crown Office Department a notice for the production in Court of all the affidavits filed in support of, and in opposition to, the original order (*ibid.* r. 78).

MANDAMUS UNDER STATUTORY AUTHORITY.—The high prerogative writ of mandamus is to be distinguished from various writs of mandamus or orders in the nature of mandamus which are granted under statutory authority.

Mandamus to take Evidence in India and Colonies.—Thus under the East India Company Act, 1772, 13 Geo. III. c. 63, s. 40, a writ of mandamus may be awarded by the Queen's Bench requiring the judges of certain of the Indian Courts to take the examination of witnesses in cases of indictments or informations exhibited in the Queen's Bench for misdemeanours or offences committed in India.

The Evidence on Commission Act, 1831, 1 Will. IV. c. 18, extended the powers contained in the last-mentioned Act relating to the examination of witnesses in India to all colonies and places under the dominion of the Crown in foreign parts, and to the judges of the several Courts therein; and to all actions depending in the Courts at Westminster. See also the Evidence by Commission Act, 1885, 48 & 49 Vict. c. 74.

Action for Mandamus.—The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 68, enabled a mandamus to be obtained by action. That section is now repealed, but is replaced by Order 53 of the R. S. C. 1883, rule 4 of which provides that no writ of mandamus shall thereafter be issued in an action, but a mandamus shall be by judgment or order, which shall have the same effect as a writ of mandamus formerly had. The plaintiff in any action in which he claims a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, must indorse such claim upon the writ of summons (*ibid.* r. 1); and if judgment be given for him, the Court or judge may by the judgment command the defendant, either forthwith or on the expiration of such time and upon such terms as may appear just, to perform the duty in question (see *ibid.* r. 3).

The action for a mandamus is apparently not restricted to cases in which the prerogative writ would be granted (see *Norris* v. *The Irish Land Co.*, 1857, 8 El. & Bl. 512). An action for a mandamus may lie even when no actual damage has been sustained, and a mandamus may be claimed independently of any other relief (see *Fotherby* v. *Metropolitan Rwy. Co.*, 1866, 2 C. P. 188), and may be asked for and granted even after judgment has been obtained (see *Easton & Co.* v. *Nar Valley Drainage Commissioners*, 1892, 8 T. R. 649).

But a mandamus cannot be obtained by action where there is some other remedy equally convenient, beneficial, and effectual; in this respect the rules regulating the granting of the prerogative writ are applicable to an action of mandamus (see *R.* v. *Registrar of Joint-Stock Companies*, 1888, 21 Q. B. D. 131; *Peebles* v. *The Oswaldtwistle Urban District Council*, [1897] 1 Q. B. (C. A.) 625; *Smith* v. *The Chorley District Council*, [1897] 1 Q. B. 532; *ibid.*, [1897] 1 Q. B. (C. A.) 678).

An action for a mandamus does not lie against justices even with their consent; the appropriate remedy is the prerogative writ of mandamus to the justices (see *Baxter* v. *London County Council*, 1891, 63 L. T. 767; see also *post* under the head *Rule to Justices*). Nor will an action of mandamus lie to compel a local authority to approve building plans. The remedy is by

applying for a prerogative writ of mandamus (see *Smith* v. *The Chorley District Council*, cited *supra*).

Interlocutory Order for Mandamus.—The Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (8), provides that a mandamus may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made.

It has been said that under this section a judge of the Chancery Division may direct the issue of a mandamus in any cause or matter pending before him (see *In re Paris Skating Rink Co.*, 1877, 6 Ch. D. 731). The jurisdiction, however, appears to be more limited (see *Glossop* v. *Heston and Isleworth Local Board*, 1878, 12 Ch. D. at p. 115; see also *Widnes Alkali Co.* v. *Sheffield and Midland Company's Committee*, 1877, 37 L. T. 131; *A.-G.* v. *Guardians of Poor of Union of Dorking*, 1881, 20 Ch. D. 595).

Rules or Orders in the Nature of Mandamus.—Modern legislation has in several important classes of cases introduced a simpler and more expeditious procedure by rule or order of the High Court in place of the older remedy by means of the prerogative writ of mandamus. Under the provisions of various statutes a rule or order in the nature of a mandamus can now be obtained on application to the High Court, compelling justices of the peace, revising barristers, coroners, and County Court judges to perform some duty connected with their offices which they have refused or neglected to perform. The procedure on the application for such a rule or order is, in nearly all respects, the same as on an application for the prerogative writ.

The Crown Office Rules, 1886, provide that an application for an order in the nature of a mandamus to justices, or to a County Court judge, or to justices to state and sign a case, shall be by motion for an order *nisi*, as in the case of an application for a writ of mandamus (see r. 80).

Rule to Justices.—To compel justices of the peace to perform duties relating to their office, procedure by rule instead of mandamus was provided by the Justices Protection Act, 1848, 11 & 12 Vict. c. 44.

Under sec. 5 of that Act, in all cases where justices of the peace refuse to do any act relating to the duties of their office, the party requiring such act to be done may apply to the Queen's Bench Division, upon an affidavit of the facts, for a rule calling upon them and also the party to be affected by such act, to show cause why it should not be done; and if, after due service of such rule, good cause be not shown against it, the Court may make the rule absolute, and the justices, upon being served with such rule absolute, must obey the same, and do the act required, and no action or proceeding can be commenced or prosecuted against them for having obeyed such rule and done the act thereby required.

It has been held that the application of sec. 5 is not confined to cases where justices require protection in respect of the acts they are called upon to do (see *R.* v. *Biron*, 1884, 14 Q. B. D. 474; not following *R.* v. *Percy and Others*, 1873, L. R. 9 Q. B. 64; *R.* v. *Phillimore*, 1884, 14 Q. B. D. 474 *n.*).

The remedies by mandamus and by rule are apparently concurrent, and granted at the discretion of the Court (see *R.* v. *Phillimore*, cited *supra*), and no definite rule as to when proceedings against justices should be by the prerogative writ and when by rule under sec. 5 has been laid down.

See further as to a rule in the nature of a mandamus against justices,

R. v. *Marsham*, 1883, 50 L. T. 142; *Ex parte Lewis*, 1888, 21 Q. B. D. 191.

Rule to Revising Barrister.—The Parliamentary and Municipal Registration Act, 1878, 41 & 42 Vict. c. 26, s. 37, provides that if any person feels aggrieved by a revising barrister neglecting or refusing to state any case he may within one month apply to the High Court, upon affidavit of the facts, for a rule calling on the revising barrister and also on the person, if any, in whose favour the decision from which the applicant desires to appeal was given, to show cause why a rule should not be made directing the appeal to be entertained and the case to be stated, and thereupon the High Court, or any judge thereof in chambers, may make such rule to show cause, and make the same absolute, or discharge it, with or without payment of costs, as seems just; and the revising barrister on being served with any such rule absolute must state the case accordingly, and the case must be stated and the appeal entertained and heard notwithstanding any limitations of time or place contained in the Parliamentary Registration Act, 1843. See REVISING BARRISTER.

Order to Coroner.—Under the Coroners Act, 1887, 50 & 51 Vict. c. 71, s. 6, where the High Court upon application made by or under the authority of the Attorney-General is satisfied either that a coroner refuses or neglects to hold an inquest which ought to be held, or, where an inquest has been held by a coroner, that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable in the interests of justice that another inquest should be held, the Court may order an inquest to be held, and where an inquest has already been held may quash the inquisition on that inquest. See CORONER.

Order to County Court Judge.—Mandamus would formerly lie to compel a County Court judge to exercise jurisdiction, but the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 131 (re-enacting a similar provision of the earlier Acts), provides that no writ of mandamus is to issue to a judge or officer of a County Court for refusing to do any act relating to the duties of his office, but any party requiring such act to be done may apply to the High Court, upon an affidavit of the facts, for an order or summons calling upon the judge or officer, and also the party to be affected by the act, to show cause why it should not be done; and if cause be not shown, the High Court may by order direct the act to be done, and the judge or officer upon being served with such order must obey the same on pain of attachment. This provision has been held to apply to the City of London Court (see *Blades* v. *Lawrence*, 1874, L. R. 9 Q. B. 374). The granting of such an order is discretionary, and depends on the same principles as the issue of a mandamus (see *Irving* v. *Askew*, 1870, L. R. 5 Q. B. 208; *Sharrock* v. *London and North-Western Rwy. Co.*, 1875, 1 C. P. D. 70; *Rhodes* v. *The Liverpool Commercial Investment Co.*, 1879, 4 C. P. D. 425; *Morgan* v. *Rees*, 1880, 6 Q. B. D. 89; *R.* v. *Richards*, 1851, 20 L. J. Q. B. 352; *R.* v. *Stapylton*, 1851, 21 L. J. Q. B. 8; *R.* v. *Harwood*, 1853, 22 L. J. Q. B. 127; *R.* v. *The Judge of Marylebone County Court*, 1884, 50 L. T. 97; *R.* v. *Registrar of Greenwich County Court*, 1885, 15 Q. B. D. 54; *R.* v. *Cowper*, 1889, 24 Q. B. D. 60).

But mandamus is still the proper course to compel a County Court judge to perform a special duty imposed upon him by statute, which is not

a matter within his ordinary jurisdiction (see *In re The Brighton Intercepting Sewers Act*, 1870, 1882, 9 Q. B. D. 723).

Where a County Court judge, under the erroneous belief that he had no jurisdiction, refused to hear and determine a case, it was held that an order in the nature of a mandamus would lie to compel him to do so (*R.* v. *Judge of Southampton County Court*, 1891, 65 L. T. 320).

[*Authorities.*—Comyns, *Digest*, title "Mandamus"; Bacon, *Abridgment*, title "Mandamus"; Willock, *Treatise on Mandamus*, 1827; Gude, *Crown Practice*, 1828; Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus*, 1848; High, *Treatise on Extraordinary Legal Remedies*, 1874; Shortt, *Informations, Mandamus, and Prohibition*, 1887; Short and Mellor, *Crown Office Practice*, 1890.]

Mandate.—See BAILMENTS.

Mandatory Injunction.—See INJUNCTION, vol. vi. p. 471.

Mandatory Order.—See INJUNCTION.

Mandavi ballivo (I have commanded the bailiff).—Where a writ is delivered to a sheriff and execution thereon has to be levied within a liberty, the sheriff makes a return that he had commanded the bailiff of such liberty to execute the writ, and stating the return (if any) made to him by such bailiff. If no return has been made by the bailiff, that fact should be returned by the sheriff (1 Chit. *Arch. Prac.*, 14th ed., 819; Chitty's *Forms*, 12th ed., 413).

Manhole—A means of entering sewers or drains for their inspection and cleansing. It is treated as part of the sewer (*Swanston* v. *Twickenham Local Board*, 1883, 11 Ch. D. 838). In the event of neglect in the construction, closing, or maintenance of a manhole, the sewer authority is liable for any damage caused (see *Thompson* v. *Brighton* (*Mayor*), [1894] 1 Q. B. 332).

Mania.—See LUNACY; MEDICAL JURISPRUDENCE.

Manifest—In commercial navigation, a document containing a description of goods shipped, an identification of the same by their distinctive marks or numbers, and the names of the consignors. On the exportation of goods for which no bond is required, the master or owner of the ship is required within six days after the final clearance thereof to deliver to the proper officer of customs a manifest, signed and declared to be accurate, giving the above particulars (Revenue Act, 1884, s. 3). If a manifest, or a declaration in lieu thereof, is not so delivered, or an incomplete or inaccurate one is furnished, those in default are liable to a penalty not exceeding £5 (*ibid.*).

Manifesto in international law is a declaration by which a belligerent State gives notice to its own citizens, and more especially to neutrals, of the existence of a state of war. Though there is no precise rule as to the date from which neutrals are affected by war, the absence of a manifesto might cause difficulties in claiming the rights a state of war entails against a neutral State which had not received notice of its existence. It is therefore the practice of belligerents to give a formal warning to neutral States. The term "manifesto" is also applied to any public declaration by a sovereign, government, or party, as to his or their conduct or course of action. See BELLIGERENT; DECLARATION OF WAR; NEUTRALITY; WAR.

Man, Isle of.—An island in the Irish Sea, formerly ruled by Welsh and Scandinavian kings, ceded by Norway to Alexander III. of Scotland in 1226. In 1290 certain of the inhabitants placed themselves under the protection of Edward I. The kings of England granted their rights in the island to a succession of feudatories; in 1406 the head of the house of Stanley became "king of Man" in perpetuity; in 1651 the title of king was exchanged for that of lord. In 1735 the Duke of Athole became lord of Man; in 1765 the sovereignty of the island was purchased by the Crown; and in 1829 the surviving rights and privileges of the Athole family were bought up. In 1421 the customs of the Manx people were recorded; their institutions still retain much of their original character.

Executive authority is now in the hands of a governor or lieutenant-governor appointed by the Crown. His council consists of the bishop, the attorney-general, the two deemsters, the clerk of the rolls, the water bailiff or admiral, the treasurer or receiver-general, the archdeacon, and the vicar-general. The House of Keys consists of twenty-four representatives; down to 1866 vacancies in this body were filled by co-optation, the House nominating two persons, of whom the governor chose one. The Keys are now elected; the franchise is tolerably wide, and women are permitted to vote. The Governor, Council, and Keys constitute the Court of Tynwald, which is held usually in the month of July. Bills which have passed the House and the Council require the assent of the Queen in Council, but even after the Royal assent is given they are not considered binding until they are proclaimed in Manx and English on the Tynwald Hill. The Church in Man is a branch of the Church of England, but it possesses certain canons and customs of its own (see ARCHBISHOP, vol. i. p. 312). The diocese of Sodor and Man formerly included some of the southern Hebrides—hence the name Sodor or Sudreys; it now includes only Man and its dependencies. The bishop has a seat but not a vote in the House of Lords.

The Courts of the island include the Chancery Court, the Court of Exchequer, and the two common law Courts presided over by the deemsters, each of whom has a district assigned to him. The House of Keys and the "staff of government" (*i.e.* the Governor in Council) exercise an appellate jurisdiction in certain cases; the final appeal is to the Queen in Council (see PRIVY COUNCIL). The traditional division of the island is into sheadings, treens (now obsolete), and quarterlands. The land laws of the island bear a general resemblance to those of England, but entails are unknown; the usual form of tenure was in its origin a kind of villeinage. Lands were "set" to tenants in May, four men from each parish attending to form a

"setting quest" or jury. No seal or stamp appears to be necessary to the validity of a deed, unless it is to be used out of the island. Man is not bound by Acts of Parliament unless it is specially named.

Harbours.—The care of the harbours in the Isle of Man is intrusted to Harbour Commissioners, consisting of the Receiver-General and four persons appointed by the Governor with the approval of the Court of Tynwald, and removable by him, who hold office for three years, and are re-eligible at the end of their term of office, and receive payment of their expenses. They have the power to maintain, regulate, improve, and enlarge the harbours of the island, maintain the lighthouses, lights, and beacons necessary for the safety of vessels using the harbours; they have (with the exception of constructing harbours, docks, or piers, keeping lifeboats, tide and weather gauges, police, and access to the Act) the powers and liabilities of harbour authorities under the Harbours, Docks, and Piers Clauses Act, 1843; they are the pilotage authority (see PILOTS); they may define the limits of any harbour in the island, with the approval of the Board of Trade and by a resolution of the Court of Tynwald, and they have conservancy powers, such as constructing works for the benefit of harbours or navigation with the consent of the Board of Trade, and removing wrecks and other obstructions to navigation; they may also borrow money, with the approval of the Treasury and the Court of Tynwald, on the security of any sums set apart for harbour purposes (under the 1866 Act, *post*), and the Public Works Loan Commissioners may lend money to them on such security. The Court of Tynwald may, with the approval of the Board of Trade, and when required by the Governor, appoint dues to be taken by the Commissioners from vessels entering and leaving any harbour, dock, or pier of the island under the control of the Commissioners (1872, 35 & 36 Vict. c. 23; 1874, 37 & 38 Vict. c. 8; 1884, 47 Vict. c. 7, s. 4). The Harbours and Passing Tolls Act, 1861, applies to the Isle of Man (1863, 26 & 27 Vict. c. 86), and the Government of the island are a harbour authority within the meaning of that Act (1888, 51 & 52 Vict. c. 39, s. 8); and one-ninth of the duties of customs in the island must be applied in improvements in harbours, etc. therein, and the Harbour Commissioners may borrow for the purpose of such improvements on two other ninths of customs (1866, 29 & 30 Vict. c. 23). The Government of the Isle of Man has also power, with the approval of the Treasury and the Tynwald Court, to borrow money for (*inter alia*) making improvements in harbours, on the security of these three-ninth parts of the customs, and the surplus of the customs after paying charges thereout, and the dues taken at Port Erin and other harbours, which may be repaid at any time within sixty years after its being borrowed (1880, 43 & 44 Vict. c. 8, ss. 2, 3; 1897, 60 & 61 Vict. c. 51, s. 10). The Court of Tynwald, when so required by the Governor, and with the approval of the Board of Trade, may impose a passenger duty not exceeding 3d. to be taken by the Commissioners from every person embarking or disembarking in or from any vessel of five tons burden leaving or entering the harbours of the island, the limits of which are defined under the Act of 1872; and such passenger duty is a security on which the Commissioners may borrow for harbour improvements (1883, 46 Vict. c. 9, ss. 2, 7, 8). Tolls may also be taken (without obtaining the approval of the Board of Trade) from persons using piers, docks, quays, or landings under the control of the Commissioners; and dues may be charged on cargo landed instead of tonnage duties; and such tolls and dues are a security on which the Commissioners may borrow for harbour purposes (1884, 47 Vict. c. 7, ss. 5, 6). The Government of the

Isle of Man may also guarantee the repayment of any loan made to the Harbour Commissioners, and give the security of such revenue (specified in the 1880 Act) as collateral or additional security to the security given by the Commissioners (1888, 51 & 52 Vict. c. 39, s. 8).

[*Authorities.*—Johnson's *Manx Jurisprudence*; Collections of Local Statutes, ed. Mills, Geneste, and Jeffcott, and Index by Rev. W. Mackenzie.]

Manitoba.—See CANADA.

Manor; Manor House; Manorial Courts (Latin, *Manerium*; French, *Manoir*).—The term "manor" was probably introduced into England at the time of the Norman Conquest. It is derived from the Latin verb *manere*, and properly does not seem to mean much more than a hall or house. In English law it may be generally stated that the existence of a manor presupposes demesne lands vested in a lord, the services of at least two freehold tenants holding of the manor, whose tenements are subject to escheat and the right of jurisdiction in a court baron. It is impossible to say, however, that the *Manerium* of Domesday Book answers to this description. It has been conjectured (Professor Maitland, *Domesday and Beyond*, pp. 107–128) that the word was first used in a legal sense to define the particular house at which the geld or land tax payable in respect of a certain holding might be charged; and a *manerium* or manor has consequently been defined as a tenement which either pays its geld at a certain place, or which would do so if it were not freed from such tax by a special privilege. Other conjectures have identified the manor with the Roman villa or the German mark; and it has been supposed that the manor is simply the vill or parish regarded as the territorial dependence of a lord—a view which, however, can hardly be supported, as manors are not in all cases conterminous with parishes; and the vill from which the modern parish is derived in the Domesday survey, though it often coincides with the manor, is a totally different thing (see article PARISH); and it may be added that in one manor there are occasionally several vills or townships.

Whatever, however, may have been the earlier use of the word, the expression "manor," as used in the thirteenth century, does not seem to have been a technical term. The word in that period, though occasionally used in legal writings, seems to have borne a meaning as vague as the word estate as used by laymen at the present time. The typical manor of this period, was, however, often identical with the vill or township, and when this was the case it constituted a unit of public police and fiscal law, a unit in the agricultural system, a unit in the management by lords of their property, and lastly a jurisdictional unit. (This definition is given in Pollock and Maitland, *Hist. Eng. Law*, i. 585.)

But there were many estates known as manors at this period to which such a description, if applied, would be misleading. The restrictions on seignorial jurisdiction, and the modifications of the feudal system which marked the thirteenth century, tended to give importance to the word "manor" (see on this point the article COURT BARON AND COURT LEET, vol. iv. p. 3). The English law in the earlier part of the thirteenth century admitted the general principle that "any lord who had tenants enough to form a Court" might hold a Court of and for such tenants; but this principle was so far limited by the provisions in the Statute of Marlborough, 1269,

that suit of Court was only exigible if it had been stipulated for on the occasion of the feoffment, or if it had been customarily done prior to a certain date in 1230.

In 1290 the Statute Westm. iii. (*Quia Emptores*), 18 Edw. I. c. 1, while making it lawful for every freehold tenant to sell his lands, provided that the feoffee (that is to say the person whom such vendor or feoffor enfeoffed of his lands) should hold such lands and tenements of the chief lord of the same, for by such services and customs as the feoffor held before of him. The statute did not originally apply to the tenants who held *in capite* of the Crown; but it was extended to them by the Statutes 17 Edw. II. (De Prærogativâ Regis, c. 6) and 34 Edw. III. c. 15. The effect of these statutes was to prevent any further subinfeudation, that is to say the alienation by a tenant in fee of lands on condition that the alienee held the lands of him on condition of rendering to him the same services that he rendered to his overlord. But as to these statutes, see article TENURES.

So that the effect of the Statutes of Marlborough and of *Quia Emptores* taken together was to give a new legal meaning to the word "manor." A manor began to be looked at by lawyers in connection with the right of a lord to hold a Court, and the legal theory therefore grew up that only the lord who had a manor could hold a Court for his tenants, and that manors, using the word in the modern technical sense, could no longer be created after the Statute *Quia Emptores*. Lord Coke even states that the king himself could not create a manor, but this statement appears too wide, even from the modern point of view. The Crown can still, by charter, confirmed by Parliament, enable subjects to create manors (*Delacherois* v. *Delacherois*, 1862, 11 H. L. 62); and even Lord Coke himself (*Co. Litt.* 98 *b*, 2 *Inst.* 501) states that the Statute *Quia Emptores* may be dispensed with by the consent of the Crown and all the mesne lords.

To understand the development of the manorial system, it may be well to consider the typical mediæval manor. It would contain a chief seat or capital mansion, the residence in general of the lord, certain demesne lands retained by the lord for his own use; certain lands not in the lord's demesne but held by freehold tenants owing feudal services to him, often commuted for money payments, and certain lands carved out of the demesne lands occupied by tenants in villeinage, owing services to the lord, who might also be divided into different classes, from the villeins, who had substantial holdings, to the cottarii, who had a mere cot and apparently no arable land. The uncultivated part of the manor would be known as the lord's waste, and it served for public roads and for common of pasture for the lord's and tenants' cattle.

The fact that the lord had tenants and services would imply of necessity a Court baron for civil jurisdiction, at which Court the freehold tenants would be judges. In a large number of manors also there would be a Court leet, that is to say, a Court with criminal jurisdiction, which the lord would hold in virtue of a jurisdictional franchise from the Crown, at which Court he or his steward would preside. Further, there would be in most cases a customary or copyholders', for the tenants in villeinage, also known by common usage as the Court baron, at which the lord or his steward would be the judge, though it is probable that at one time the Court baron and the customary Court were identical.

In addition to a Court leet other franchises might also in many cases be possessed by the lord, *e.g.* waif and stray, treasure trove, wrecks, the liberty of holding markets and fairs, tolls, etc.

From such a system as that above described, the manorial system has

been developed; but the industrial revolution following the Black Death, and the depreciation of the value of money, which practically rendered the sums at which the services due from freeholders and copyholders had been commuted of little value, extinguished the manor as a unit for economic purposes, so much so that Lord Coke found that a manor in his time signified rather the jurisdiction incorporate therein than the land or site.

Having thus traced the historical origin of the expression "manor," it is necessary to return to the legal meaning which a series of legal decisions has impressed upon it. In the eyes of modern lawyers a manor is, as has been stated, an indivisible entity (*R.* v. *Duchess of Buccleugh*, 1717, 3 Arn. 6 Mod. 15), which cannot now be created (see *ante*), of which the constituent parts are demesne lands and services, which implies a Court baron (see *ante*), and which may further, and generally will, contain lands, franchises, and rights appendant or appurtenant to it, and which are regarded as parcel of it.

The effect of a severance between the demesne lands and the services which may occur if a different person becomes entitled to each, is to destroy the manor. The person who on such a severance becomes entitled to the services holds them as a seigniory in gross, while the owner of the demesne lands retains a reputed manor, or a manor in reputation, and continues to enjoy many of the rights and franchises appendant to the manor. If such a severance is effected by act of law, as if there be two coparceners of a manor, and on a partition, the demesne lands are allotted to one, and the services to another, although there is here an absolute severance, yet if one of the coparceners dies without issue, and the demesnes descend to her who hath the services, the manor is revived again, because the demesne lands and the services were severed and united again by act of law (*Sir Moyle Finch's* case, 1607, 4 Jac. I. 6 Rep. 63 *a*); for in this case the existence of the manor is suspended, but not extinguished. Generally, lands once severed from a manor can never again become a parcel of it in reality, but they may become so in reputation, if they both come into the possession of the same person (*R.* v. *Duchess of Buccleugh, supra*).

The extinction of the services of freehold tenants, of which the effect is to destroy a manor, may take place if, *e.g.*, at any time the freehold lands holden of the manor are purchased by or escheat to the lord, for in such case there can be no Court baron, which of necessity must be held before two freehold tenants holding of the manor at the least, and the lord cannot, since the Statute *Quia Emptores*, create new mesne tenancies to be holden of him in fee-simple (*Chilwoode* v. *Crew*, 1746, Willes, 614; *Bradshaw* v. *Lawson*, 1791, 4 T. R. 443; 2 R. R. 429); for the holder of such tenancy if created would under the statute hold of his superior lord. The law as to the necessity of two freeholders to constitute a manor seems to have been first laid down in a judgment of the Star Chamber in the twenty-third or thirty-third year of Henry VIII. (Maitland, *Introduction to Select Pleas in the Manorial Courts*, lxi. *et seq.*; see also *Co. Litt.* 58 *a*; 4 Co. Rep. 26 *b*; 6 Rep. 64 *a*). It is not absolutely clear whether any tenancy of freehold will suffice to qualify a suitor for a Court baron, or whether, as is more probable, it must be a tenancy in fee-simple; if the latter is not the case, the lord might still create freehold tenancies by giving leases for lives.

When a manor ceases to exist as a manor, and continues only as a manor by reputation, it will exist in the contemplation of the law so far as its existence may be necessary to preserve the franchises and privileges of the lord formerly annexed or appurtenant to it, as, for instance, the right

to appoint a sexton, where such right has been immemorially annexed to a manor, which for defect of freehold tenant continues to exist, exists only as a manor by reputation (*Soane* v. *Ireland*, 1808, 10 East, 259; 10 R. R. 285). And where there is only one freehold tenant left who holds of a manor, although the manor has ceased to exist, and no Court baron can be held, the seigniory or lordship still exists as to such one tenant, and he is liable to perform his services. Franchises and privileges must be regarded as appurtenant to the demesne lands.

Generally speaking, a manor is not divisible, except perhaps by act of law; but there is jurisdiction in equity to compel partition thereof, although the result may be to destroy the manor, and this jurisdiction has existed from a very early period (*Hanbury* v. *Hussey*, 1851, 14 Beav. 152; *Sparrow* v. *Fiend*, cited *ibid.* p. 156; and see also *Cattley* v. *Arnold*, 1858, 4 Kay & J. 595).

In the case of a partition between two coparceners, if parcels of the demesne lands and services are allotted to each, it has been held that each in a sense has a manor, because they are in by act of law, and they may therefore each hold separate Courts; but in the case of tenants in common or joint-tenants, each of them hath not a separate manor, not being in by act of law, but entitled under their own acts, and therefore such tenants must all agree as to holding the Courts (15 Vin. *Abr.* "Manor," p. 223).

(As to the effect of the division of a manor by act of parties, which may for some purposes be good, see *Harris* v. *Hares*, Cro. 25 Eliz. c. 19; Vin. *Abr.* 223; Scriven on *Copyholds*, p. 11.)

The alienation of the manor house or a portion of the demesne lands, provided that part of the demesne lands and services remains, will not destroy the manor (*Winter* v. *Loveday*, 1697, 9 Will. III. 5 Mod. 382).

With regard to freehold tenements of the manor reacquired by the lord, it is necessary to distinguish between those which he may reacquire by escheat and those which he may reacquire by purchase. The former will still continue parcel of the manor, but the latter will not become part of the manor, but will be holden by him of his superior lord (*Delacherois* v. *Delacherois, supra*).

At common law the grant of a manor, or the devise of it in a will has, unless a contrary intention is indicated, the effect of passing everything that is appendant to it, whether *de jure* as the right to hold a Court baron, or *de facto* as an advowson, and it is necessary to exempt things which may *de facto* form parcel of the manor, if it is intended that they shall not pass under the grant or devise (*A.-G.* v. *Ewelme Hospital*, 1853, 17 Beav. 366; *Hicks* v. *Salk*, 1853, 3 De G., M. & G. 782; *Hicks* v. *Hastings*, 1857, 3 Kay & J. 701); and it must be remembered that all lands, except perhaps escheated copyholds or lands enfranchised under the Copyhold Acts, which have originally formed part of a manor, are still said to lie within the ambit of the manor, and are to some extent subject to the jurisdiction of its Courts (see Elton, p. 13; but as to evidence, see Scriven, pp. 479, 480).

The word "manor" will also pass allotments made to the lord under an Inclosure Act in respect of his right to soil (*Hicks* v. *Phillips, supra*), but not, for the reasons above stated, freehold tenements of the manor purchased by the lord. Nothing that is not parcel of the manor, as a royal franchise of free warren, will pass under a grant of a manor, but if appurtenant to the manor, though not otherwise, it will pass, if the words *cum pertinentiis* are added (*Norris* v. *Timis*, 1834, 1 Ad. & E. 654; *Doe d. Clayton* v. *Williams*, 1843, 11 Mee. & W. 803).

Where a manor consists of fealty and rents, a grant of the rents will pass the manor. The grant or devise of a manor that has ceased to be a manor and exists only as a manor by reputation, will not pass any tenement in the manor or the freehold interests of the lord in the waste (*Doe d. Clayton* v. *Williams*, 1843, 11 Mee. & W. 803). By a fine levied on a manor, a manor in reputation will not pass (Cro. (1) 708).

The Conveyancing Act, 1881, s. 6, subs. (3), provides that—

A conveyance of a manor shall be deemed to include, and shall by virtue of this Act operate to convey with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, Courts leet, Courts baron, and other Courts, view of frankpledge, and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief rents, quit-rents, rents charge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

For the purposes of the Conveyancing Act, 1881, s. 2, subs. iv., and the Settled Land Acts, 1882–1890 (Settled Land Act, 1882, s. 2, subs. 5), the expression "manor" includes lordship and reputed manor and lordship.

Lands imperceptibly added to the demesne lands of a manor by the alluvion of the sea belong to the lord and not to the Crown, and in the same way if the demesne lands are gradually encroached upon by the sea, the demesne lands thereby covered will become the property of the Crown (*Gifford* v. *Lord Yarborough*, 1828, 5 Bing. 163; *R.* v. *Hull and Selby Rwy. Co.*, 1839, 5 Mee. & W. 327). (As to a manor holden of another manor, see article HONOUR in Addenda in vol. xii.).

As to precautions against fire, fire-curtains, etc., in case of grant of licence for theatricals in house or manor within district affected by London Buildings Act, see LONDON COUNTY. See also articles AMERCIAMENTS; STEWARD OF MANOR.

The other subject-matters arising in respect of the legal incidents of a manor are treated under the following headings:—

COPYHOLD (as to tenants in villeinage, etc.).

CUSTOMARY FREEHOLDS (as to the freehold tenants).

COMMON (as to the waste of manor).

SEIGNIORY (as to the franchises, rights, and privileges of the lord of a manor, and as to mines, minerals, etc.).

See also articles FEALTY; SUIT OF COURT; QUIT-RENTS; RELIEFS; HERIOTS.

As to the rolls of a manor, see article ROLLS (COURT).

Manorial Courts.—As to the history and status of the Court baron, Court leet, and Copyholders' Court, see articles *sub titulis*. The following facts may be added.

Court Baron.—This Court was originally not only the lord's Court in respect to his services, it also had the right of determining pleas of a personal nature, *e.g.* debts or trespass when the damage was not above 40s., and it might by prescription or charter hold pleas for a larger amount. This jurisdiction has now passed to the County Court (30 & 31 Vict. c. 142; County Courts Act, 1867, s. 28; see also County Courts Act, 1888, 51 & 52 Vict. c. 146, s. 6, and County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 14). Its jurisdiction extended not only to the tenants holding of the manor, but also to strangers coming within its ambit, and by prescription it might also have a wider jurisdiction.

A Court baron is not a Court of Record, and it cannot be severed from the manor by means of a grant by reservation, except in the case of the king; but the profits may be assigned.

The Court baron was originally held at intervals of three weeks, but it is now seldom held, except on manors where the freehold tenants have customs relating to fines, heriots, etc., resembling those of copyholders. As the right to hold it is incident to the manor, it is not lost by non-user.

The freehold tenants are judges at the Court baron, but the lord's steward is registrar, and is probably also a necessary part of it.

The lord of a manor is said to be chancellor in his own Court.

Court Leet. — The Court leet is a Court of Record, at which the steward of the manor is the judge, and to which is annexed the view of frankpledge. The proper title of a Court leet is the "Court Leet and View of Frankpledge of our Lady the Queen," and all the inhabitants of the district may be summoned to be present under the penalty of a small fine. Apart from custom, the usual course is for the steward to give notice to the bailiff to summon a number of the principal inhabitants, so as to ensure that a jury will be obtained. The jury in a Court leet generally numbers more than twelve and less than twenty-four (see article JURY). The duty of the jury of the Court leet at the present time is to appoint or to present the appointment of certain officers, *e.g.* the bailiff, and also to present public nuisances which may have taken place within its jurisdiction (*e.g.* the stopping up of a road). A Court leet may be appendant to a hundred or a vill as well as to a manor, and if a corporation is lord of a manor there may be a Court leet appendant to a borough.

Copyholders' Court.—To every manor which has copyhold tenants, a customary Court (which is also usually styled a Court baron) is a necessary incident. Every copyholder is bound to attend this Court, and to serve upon the homage jury. At this Court the lord or steward is judge. As to the present jurisdiction of this Court, see article SUIT OF COURT. Also as to a writ of mandamus in respect to a manorial Court, see article SUIT OF COURT.

[*Authorities.—Co. Litt.*; Coke, *Copyholder*; Maitland, *Domesday and Beyond*; Pollock and Maitland, *Hist. Eng. Law*; Freeman, *Hist. Norman Conquest*, vol. v.; Stubbs, *Const. Hist. of England*; Stubbs, *Select Charters*; Maitland, *Introduction to Select Pleas in the Manorial Courts*; Vinogradoff, *Villeinage in England*; Seebohm, *Early Village Community*; Blackstone, *Com.*; Cruise, *Dig.* vol. i.; Vin. *Abr.* sub tit. "Manor"; *Law Quarterly Review*, vol. xii. No. 48; Watkins on *Copyholds*; Scriven on *Copyholds*, 7th ed.; Elton on *Copyholds*, 2nd ed.]

Mansion House.—Apart from statute law or some special provisions in the instrument creating the trust, it was not usual for the Court of Chancery to allow the expenditure of trust moneys on the erection, restoration, or completion of a mansion house on a settled estate, and such expenditure was only sanctioned, if at all, when it was shown to be for the benefit of all persons interested in the estate; and even in such cases repairs were not allowed (as to repairs, see *Hibbert* v. *Cooke*, 1821, 1 Sim. & St. 552; *Dent* v. *Dent*, 1862, 30 Beav. 363; *Nairn* v. *Marjoribanks*, 1827, 3 Russ. 582; *Caldecott* v. *Brown*, 1842, 2 Hare, 144; *Dixon* v. *Peacock*, 1858, 3 Drew. 288; *Hirlock* v. *Smith*, 1853, 17 Beav. 572; *Jesse* v. *Lloyd*, 1883, 48 L. T. 656; *In re Leigh's Estate*, 1871, L. R. 6 Ch. 887; *Drake* v. *Trefusis*,

1875, L. R. 10 Ch. 364; *Dunne* v. *Dunne*, 1857, 7 De G., M. & G. 207; *Bleazard* v. *Whalley*, 1854, 2 Eq. Cas. 1093).

To enable mansions to be erected or repaired, the Limited Owners Residences Act (33 & 34 Vict. c. 56) and the Amending Act (34 & 35 Vict. c. 84), which are to be construed as one with the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), were passed. Sec. 3 of the Act 34 & 35 Vict. c. 84 provides that—

"The erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion house and such appurtenances as aforesaid, and the improvement of and addition to any mansion house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature, provided that every such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, shall be improvements within the meaning of the 'Improvement of Land Act, 1864,' and may, subject to the provisions of the recited Act, be charged upon such estate."

Sec. 4 of the same Act provides that the sum charged on any estate under settlement in this respect shall not exceed two years' rental of the estate. The expression "rental of the estate" here comprises the rentals of all estates subject to the settlement, and not merely that portion of the estate on which it is intended to build the mansion (*In re Dunn's Settled Estate*, 1877, W. N. 39).

The powers of the Land Commissioners under the above Acts are now transferred to the Board of Agriculture (34 & 35 Vict. c. 84).

The Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, subs. 4, includes among the improvements under the Settled Land Act, 1882 (see s. 25), on which capital trust moneys may be expended, the rebuilding of the PRINCIPAL MANSION HOUSE on the settled land, provided that the sum to be so applied under this subsection shall not exceed one-half of the annual rental of the settled land; and subsec. 2 of the same section includes in such improvements the making any additions to or alterations in buildings, reasonably necessary or proper to enable the same to be let.

The rebuilding mentioned in subsec. 4 will not include structural repairs, however extensive, and although executed to enhance architectural effect; but when the house has been practically reconstructed, such reconstruction will be held to be a rebuilding, which may be paid for out of capital trusts moneys under the Settled Land Acts (*In re Lord Gerard's Settled Estates*, [1893] 3 Ch. 252; *In re De Teissier's Settled Estates*, [1893] 1 Ch. 153; *In re Walker's Settled Estate*, [1894] 1 Ch. 189).

The annual rental of the settled land mentioned in subsec. 4 will comprise all land in the settlement held on the same trusts (*In re Lord Gerard's Settled Estates, supra*), but will not include any sum in respect of any part of the settled estate which is in the occupation of the tenant for life (*In re Walker's Settled Estate, supra*).

When there is no intention of letting the mansion, capital moneys cannot be expended on repairs under subsec. 2 (*In re Lord Gerard's Settled Estates*; *In re De Teissier's Settled Estates, supra*). Apart from these statutory provisions, the old rule still holds, and the Court has no jurisdiction, except in an absolute case of salvage, to charge capital moneys with repairs

(*In re Lord de Tabley, Leighton* v. *Leighton*, 1896, 75 L. T. 328). As to the leasing of a mansion house under the Settled Estates Act, 1877, see ss. 4 and 46 thereof. As to a sale of a mansion house thereunder, see ss. 16 and 25, and *Marquis Camden* v. *Murray*, 1883, 27 Sol. J. 652. As to what will constitute a mansion house under the Settled Estates Act, see *In re Spurway*, 1878, 10 Ch. D. 230.

Sec. 10, subsec. 2, of the Settled Land Act, 1896, which repeals and re-enacts, with certain alterations, sec. 15 of the Settled Land Act, 1882, provides: Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and parks and lands (if any) usually occupied therewith, shall not be sold, or exchanged, or leased by the tenant for life without the consent of the trustees or an order of the Court; but this subsection (see subs. 3) is not to apply to a house usually occupied as a farmhouse, or to a house where the site and the pleasure grounds and park and lands (if any) usually occupied therewith do not exceed twenty-five acres in extent.

As to what will constitute a principal mansion under sec. 15 of the S. L. A. 1882, s. 15, see *In re Thompson's Will*, 1888, L. R. 21 Ir. 109.

In considering applications under this section for the sale of mansions, the Court will have regard not only to the interests of the persons interested under the settlement whose sentimental feelings as to the preservation of an old property in the family may be considered, but also to the well-being of the estate itself, and the interests of the farmers and cottagers from whose industrial occupations its rents and profits are derived; and, therefore, if the tenant for life is in an impecunious position, an order for sale may be made in the interests of persons living on the estate, although against the wishes of the remaindermen (*In re Marquis of Ailesbury's Settled Estate*, [1892] 1 Ch. 506, 546; [1892] App. Cas. 356).

But in a case where the mansion house was not a family seat, and the testator had directed the same to be sold after the death of the tenant for life, the Court held that there was no reason why the tenant for life should not be at liberty to sell at his discretion (*In re Wortham's Settled Estates*, 1896, 75 L. T. 293).

The section will apply to prevent a lease of an easement over the park or lands occupied with the mansion house (*Dowager-Duchess of Sutherland*, v. *Duke of Sutherland*, [1893] 3 Ch. 169).

Where the interest of the tenant for life is mortgaged to its full, or almost to its full, value, and the trustees do not consent, the Court will not order the sale of the mansion house and park without full information as to the proposed sale, and unless the consent of the mortgagees is obtained (*In re Sebright's Settled Estates*, 1886, 33 Ch. D. 429).

The operation of this section will not be prevented by any condition of forfeiture in the event of the tenant for life ceasing to reside in the mansion house, and such tenant for life, if he sells, will be entitled to the income of the proceeds of sale for his life, but otherwise such a condition remains good (*In re Paget's Settled Estate*, 1885, 30 Ch. D. 161; *In re Haynes, Kemp* v. *Haynes*, 1887, 37 Ch. D. 306; *In re Thompson's Will, supra*).

As to serving notices under this section, see Settled Land Act Rules, r. 4.

[*Authorities.*—Lewin on *Trusts*; Wolstenholme, *Conveyancing and Settled Land Acts*, 7th ed.; Hood and Challis, *Conveyancing and Settled Land Acts*, 4th ed.; Clarke, *Settled Land Acts*, 2nd ed.; Middleton on *Settled Estates*, 2nd ed.]

Manslaughter.—This expression includes every kind of homicide (other than murder and certain forms of treason) which is treated as criminal in English law. It is difficult to treat it separately from MURDER and those forms of homicide which, as being justifiable, or excusable, or by misadventure, are not punishable, with which, in a scientifically framed code, it would naturally fall, and the sole excuse for treating it separately must be found in the present condition of the English criminal law. This, with respect to homicide, is admirably explained by Sir James Stephen, who treats not only the text-books from Coke onwards but also the judicial rulings on the subject (*Dig. Crim. Law*, 5th ed., 407; 3 *Hist. Cr.* 1–107).

The common law definition of manslaughter is "the unlawful and felonious killing by one man of another without any malice aforethought, express or implied, actual or constructive." It has never been defined by statute, but is punishable by statute—

(1) By penal servitude for life or not less than three years; or
(2) By imprisonment with or without hard labour for not over two years.
(3) By fine (exceptional in the case of a felony).
(4) By requiring recognisance with or without sureties to keep the peace (1861, c. 100, ss. 5, 71; 1891, c. 69, s. 1).

The exact meaning of "malice aforethought" is considered in detail under MURDER. In the case of manslaughter the crucial question is what acts causing the death of a man, in the absence of premeditated intention to kill, are nevertheless so unlawful (*or* felonious) as to constitute a crime; and the question frequently arises on an indictment for murder, it being open to the jury, if the circumstances of the case appear to them so to warrant, to negative the worst construction of the acts of the accused, and to convict of manslaughter (*R.* v. *French*, 1879, 14 Cox C. C. 328). This frequently happens quite independently of the true legal inference to be drawn from the evidence, but nevertheless a long course of decisions has fashioned out certain rules as to the legal elements upon which it is proper to convict of the lesser offence.

The earliest proposition on the subject is that where a person unlawfully or without justification or lawful excuse kills another by an act done intentionally, but in the heat of passion upon sudden provocation and before there is time for his passion to cool, the offence is manslaughter and not murder. In such a case it may even be that the accused meant to kill, or do grievous bodily harm.

Provocation does not include the use of lawful force against the person provoked, nor the use of words or gestures (*R.* v. *Welsh*, 1869, 11 Cox C. C. 336), nor even injury to property, unless accompanied by acts evidencing an intention to inflict bodily harm (*R.* v. *Thomas*, 1816; 1 Russ. on *Crimes*, 6th ed., 94; *R.* v. *Scully*, 1824, 1 Car. & P. 319). See BURGLARY. But it does include assault and battery, inflicting bodily harm or great insult (*R.* v. *Smith*, 1866, 4 F. & F. 1066), discovery by a husband of his wife in the act of adultery (*R.* v. *Kelly*, 1849, 2 Car. & Kir. 814; *R.* v. *Pearson*, 1834, 2 Lew. C. C. 216), and unlawful imprisonment (see Steph. *Dig. Cr.*, 5th ed., art. 245). It is not necessary that the act constituting the provocation should be done to the accused, if it is done in his presence (*R.* v. *Fisher*, 1837, 8 Car. & P. 182; *R.* v. *Harrington*, 1866, 10 Cox C. C. 370).

But the provocation will not extenuate the offence unless it actually deprives the person provoked of control; or if there is evidence, by proof of interval or otherwise, that the accused acted on reflection (*R.* v. *Lynch*, 1832, 5 Car. & P. 324; *R.* v. *Hayward*, 1833, 6 Car. & P. 157). The dis-

tinction is well illustrated by the difference between CHANCE MEDLEY, vol. ii. p. 435, and DUELLING, vol. iv. p. 364.

It is difficult to draw the line between murder, manslaughter, misadventure, or excusable homicide in the case of a fight suddenly arising (*R.* v. *Bond*, 1877, 14 Cox C. C. 1, 2), or excessive resistance to illegal arrest (*R.* v. *Carey*, 1878, 14 Cox C. C. 214; Hawk., P. C. bk. i. c. 30).

The tendency of judicial decisions is to narrow as much as possible the defence of provocation, especially where a lethal weapon is used; that of juries, to enlarge its application. But in *R.* v. *Doherty*, 1887, 16 Cox C. C. 306, it was held that the drunkenness of the accused could be considered as an element lessening the probability of a formed intention, and reducing the crime from murder to manslaughter.

The rest of the law as to manslaughter is summed up in the proposition that manslaughter is committed "wherever death has ensued as the direct but not necessarily the immediate result of an unlawful act which is not felonious (*R.* v. *Lowe*, 1850, 4 Cox C. C. 449), or of a lawful act done in an unlawful way, however unintentional or improbable the fatal result may have been" (Mayne, *Ind. Cr. Law*, 1896, p. 586). In this form the possibilities of committing the offence range through the whole sphere of the duties of man to man in every relation of life, whether arising out of status, or contract, or common citizenship, so far as those duties tend to or affect the preservation of human life. An act or omission is in this context unlawful, unless the accused had a right to do it even at the risk or cost of the life of another, *e.g.* in certain cases where an officer of justice is bound at all costs to arrest a criminal, or where a man is defending himself or others from criminal attacks of a dangerous character. The responsibility in this case differs from civil liability, in that a person is not liable for manslaughter by his agents or servants not directly authorised to do the fatal act, although in a civil action, under Lord Campbell's Act, he might be liable. This is the everyday case in railway accidents, where the owners of the line are liable for the civil damage done, and the engine-driver, if negligent, is indictable for manslaughter (*R.* v. *Birchall*, 1866, 4 F. & F. 1087); and the same happens where death is caused by furious driving by a cabman or private coachman (*R.* v. *Benge*, 1865, 4 F. & F. 504; *R.* v. *Bennett*, 1858, 8 Cox C. C. 74; *R.* v. *Hutchinson*, 1864, 9 Cox C. C. 555). To fall within the mischief of this proposition not only must the duty neglected be a legal duty (*i.e.* apparently one the breach whereof would give a cause of action), but the neglect must be culpable, *i.e.* done with an intention not to perform the legal duty. This is the meaning of the term "felonious" in the earliest definition. It does not include malice in fact, but does include neglect or recklessness of a gross nature, and appears to be based on the old maxim, *culpa lata dolo æquiparatur*. It is very difficult to analyse the degrees of NEGLIGENCE, and the word "culpable," though adopted by Sir James Stephen, cannot be regarded as happy. It must, however, be taken as connoting a certain moral quality, such as gross negligence, or reckless conduct of such a nature as to be inconsistent with a proper and reasonable regard of the life of others (*R.* v. *Elliott*, 1889, 16 Cox C. C. 710, 714). The neglect must not be coupled with intention to cause death, or the offence will be murder.

The forms of fatal negligence rendered punishable as manslaughter under the proposition fall under four main heads—

1. Negligence in the control or management of animals and things containing an element of danger, such as machinery, carriages and horses, and other animals.

2. Negligence in the treatment of sick persons.

3. Recklessness in playing lawful games or practical jokes.

4. Negligence with reference to persons not capable of providing for themselves, or reckless abuse of lawful authority.

1. All gross carelessness in doing dangerous acts or in using dangerous appliances, if attended by fatal results to others, is manslaughter. This rule has been applied—

(*a*) To the manufacture and use of firearms (*R.* v. *Carr*, 1832, 8 Car. & P. 163 *n.*; *R.* v. *Weston*, 1879, 14 Cox, 346; *R.* v. *Salmon*, 1881, 6 Q. B. D. 79), whether for practice or in self-defence (*R.* v. *Weston*, 1879, 14 Cox 346; *R.* v. *Doherty*, 1887, 16 Cox C. C. 306).

(*b*) The working of mines (*R.* v. *Haines*, 1847, 2 Car. & Kir. 368; *R.* v. *Hughes*, 1857, 7 Cox C. C. 301).

(*c*) The working of steam engines, locomotive or other (*R.* v. *Gregory*, 1860, 2 F. & F. 153; *R.* v. *Trainer*, 1864, 4 F. & F. 105; *R.* v. *Elliott*, 1889, 16 Cox C. C. 710).

(*d*) The use of carriages, horses, and even bicycles (*R.* v. *Murray*, 1852, 5 Cox C. C. 509; *R.* v. *Swindall*, 1846, 2 Car. & Kir. 230; *R.* v. *Jones*, 1870, 11 Cox C. C. 544).

(*e*) The care of vicious animals (*R.* v. *Dant*, 1865, 10 Cox C. C. 102; 3 Steph. *Hist. Cr. Law*, 24).

(*f*) The navigation of ships (*R.* v. *Taylor*, 1840, 9 Car. & P. 673; *R.* v. *Keyn*, 1876, 2 Ex. D. 63).

(*g*) The fencing of dangerous places or the obstruction of highways, where the absence of a fence or the presence of the obstruction would constitute a public nuisance or a breach of a statutory obligation (*R.* v. *Clerk of Assize of Oxford Circuit*, [1897] 1 Q. B. 370).

2. When any person, whether a qualified medical man or not, undertakes to administer medicine to or practise surgery on another person, and his act causes death, he is guilty of manslaughter, if he has grossly neglected to use reasonable care and skill, having regard to the state of the patient at the time and all the circumstances of the case. Mere error of judgment does not create liability (*R.* v. *Macleod*, 1874, 12 Cox C. C. 534); nor will unskilfulness suffice if the person acted honestly and in good faith to the best of his ability, unless it is so great as to show the grossest ignorance or want of skill or criminal inattention and want of caution (*R.* v. *Williamson*, 1807, 3 Car. & P. 635 *n.*; *R.* v. *Long*, 1830, 4 Car. & P. 398; *R.* v. *Van Butchell*, 1829, 3 Car. & P. 629; *R.* v. *Spiller*, 1832, 5 Car. & P. 333; *R.* v. *Spilling*, 1838, 2 Moo. & R. C. C. 107; *R.* v. *Markuss*, 1864, 4 F. & F. 356; *R.* v. *Wagstaffe*, 1868, 10 Cox C. C. 530). There are many more decisions, all at first instance on this subject, which are fully discussed in Beven on *Negligence*, 2nd ed., 1399.

The only difference between the case of the qualified and the unqualified person is that the latter has been regarded as reckless where he uses drugs or appliances which he does not understand (*R.* v. *Chamberlain*, 1867, 10 Cox C. C. 486; *R.* v. *Crick*, 1859, 1 F. & F. 529), where an expert might be let off as for an error in judgment.

And persons not possessing medical knowledge, who undertake to administer medicine or to operate, incur liability for manslaughter to the same extent as medical men (Beven, *Negligence*, 2nd ed., 1399–1405).

Where the operation undertaken is unlawful, *e.g.* with intent to cause abortion for any other reason than to preserve the life of the mother of the unborn child, a fatal result exposes the operator, whether a doctor or not, to

liability for murder, however careful and skilful he has been (*R.* v. *Davis*, 1883, 15 Cox C. C. 174).

Omission by a pregnant woman to call in proper aid at her delivery, if coupled with neglect of the obvious precautions for saving the child's life, may amount to manslaughter (*R.* v. *Middleship*, 1850, 5 Cox C. C. 275; *R.* v. *Handley*, 1874, 13 Cox C. C. 79).

3. Reckless playing at a lawful game, if attended by fatal results, is manslaughter (*R.* v. *Bradshaw*, 1878, 14 Cox C. C. 83; see BOXING MATCH; GAMES). Breach of the rules of the game would have the same effect (*R.* v. *Moore*, 1898, 14 T. L. R. 229).

Practical jokes, if attended by fatal results, also entail liability for manslaughter, *e.g.* where a child was frightened to death (*R.* v. *Towers*, 1874, 12 Cox C. C. 530), or a man was frightened into a river and drowned (*R.* v. *Pitts*, 1842, Car. & M. 284), or a cart is upset in a frolic (*R.* v. *Sullivan*, 1836, 7 Car. & P. 641). But there is no excuse for killing the practical joker even if he cannot otherwise be caught (see the ghost case, *R.* v. *Smith*, 1804, 1 Russ. on *Crimes*, 6th ed., 131). And there must be some reasonable connection between the fatal injury and the wanton or joking act. A mere proof that the act was an actionable wrong against the owner of property is not enough to establish negligence in the abuse of the property, with fatal results to a third person (*R.* v. *Franklin*, 1882, 15 Cox C. C. 163).

4. It is manslaughter to cause death by neglect to supply necessary food, care, and medicine to prisoners, young children, apprentices, and helpless people, where a legal duty exists by statute or contract to look after such people (*R.* v. *Friend*, 1802, Russ. & Ry. 20; *R.* v. *Plummer*, 1840, 1 Car. & Kir. 600; *R.* v. *Waters*, 1848, 18 L. J. M. C. 43; *R.* v. *Bubb*, 1850, 4 Cox C. C. 455; *R.* v. *Shepherd*, 1862, 31 L. J. M. C. 102; *R.* v. *Smith*, 1865, 34 L. J. M. C. 153; *R.* v. *Morby*, 1882, 8 Q. B. D. 571; *R.* v. *Instan*, [1893] 1 Q. B. 450, where the Court showed a disposition to make every moral duty also a legal duty). Sir James Stephen says (*Dig. Cr. Law*, 5th ed., art. 236) that this duty exists even where the accused has not the means, as he can resort to the poor law (see *R.* v. *Mabbett*, 1851, 5 Cox C. C. 339; 57 & 58 Vict. c. 41, s. 23 (2)); but this opinion is not wholly consistent with a series of cases (*R.* v. *Saunders*, 1836, 7 Car. & P. 277; *R.* v. *Chandler*, 1855, Dears. C. C. 453; *R.* v. *Rugg*, 1871, 12 Cox C. C. 16). The poor law authorities incur liability by refusing help in an urgent case (*R.* v. *Curtis*, 1885, 15 Cox C. C. 746). With respect to this form of offence the duty and liability can be transferred by delegation to another, if the means for its discharge are provided (Steph. art. 235).

If these acts are deliberately done they would of course be murder (*R.* v. *Conde*, 1867, 10 Cox C. C. 547).

Manslaughter can also be committed by abuse of authority, *e.g.* by excessive use of the parental or pædagogic power of correction (*R.* v. *Hopley*, 1860, 2 F. & F. 202; *R.* v. *Cheeseman*, 1836, 7 Car. & P. 455; *R.* v. *Griffin*, 1869, 11 Cox C. C. 402; and see CHASTISEMENT).

Where a man aims at one person and strikes another, the blow, if fatal, is not excused by the bad aim, if the blow, had it taken effect where intended, would not have been excused (*R.* v. *Brown*, 1776, 1 Leach C. C. 148; *R.* v. *Connor*, 1835, 7 Car. & P. 438; *R.* v. *Latimer*, 1886, 17 Q. B. D. 359), nor is liability avoided where a dangerous wound has been given even if a fatal result could have been avoided by proper medical treatment, and even if such treatment was proposed and declined, or the medical operation immediately causes the death (*R.* v. *Holland*, 1841, 2 Moo. & R. C. C. 351;

R. v. *Pym*, 1846, 1 Cox C. C. 339; Steph. *Dig. Cr. Law*, 5th ed., art. 241; *R.* v. *Davis*, 1883, 15 Cox C. C. 174).

Procedure.—Manslaughter is not triable at Quarter Sessions. The indictment since 1861 (24 & 25 Vict. c. 100, s. 6) need not set out the manner and means whereby death was caused, and the form in use is very simple

> The jurors for Our Lady the Queen on their oath present that A. B., on the day of A.D., feloniously did kill and slay C. D., against the peace, etc.

Though it is not necessary to go into detail as to the duty by neglect whereof the death was caused, if it is set out, it must be so set out as to show a legal duty (*R.* v. *Clerk of Assize of Oxford Circuit*, [1897] 1 Q. B. 370).

The offence, if committed within the Admiralty jurisdiction, or by a British subject on land abroad, may be tried in any county in England in which the accused is arrested or in custody (see 24 & 25 Vict. c. 100, s. 9) (*R.* v. *Dudley*, 1884, 14 Q. B. D. 273).

Where the death does not take place where the injury is done, the venue is regulated by 24 & 25 Vict. c. 100, s. 10, and as between local jurisdictions in England, apparently by 7 Geo. IV. c. 64, s. 12, which is said to be substituted for the repealed Act 2 & 3 Edw. VI. c. 24.

All killing by direct violence being *primâ facie* murder, the burden of proof thereof is on the accused to rebut this presumption and to prove mitigating or extenuating circumstances (*R.* v. *Cavendish*, 1873, 8 Ir. R. C. L. 178; *R.* v. *Elliott*, 1889, 16 Cox C. C. 710).

Where a man has been convicted of an offence against another, of which the latter ultimately dies, the prior conviction is no bar to prosecution for manslaughter (*R.* v. *Friel*, 1890, 17 Cox C. C. 325).

[*Authorities.*—3 *Co. Inst.*; Hawk., P. C., bk. i. c. 30; Foster, *Cr. Law*, 2nd ed.; East, P. C.; 3 Steph. *Hist. Cr. Law*, 1–107; Steph. *Dig. Cr. Law*, 5th ed.; Archbold, *Cr. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed., vol. iii. pp. 171–204.]

Mantrap—A gin or other device to catch trespassers. It is a misdemeanour to set or place, or cause to be set or placed, any mantrap, spring-gun, or engine calculated to destroy human life or to inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm on a trespasser or other person coming in contact therewith. But they may lawfully be set in a dwelling-house by night for its protection. Persons who deliberately leave traps set by others are treated as having set them.

The punishment is penal servitude from three to five years, or imprisonment with or without hard labour for not over two years, or fine or sureties (1861, c. 100, ss. 31, 71; 1891, c. 69, s. 1).

See BODILY HARM.

An action will lie for injury sustained even by a trespasser by means of a mantrap (*Bird* v. *Holbrook*, 1828, 4 Bing. 628; 29 R. R. 657; Beven on *Negligence*, 2nd ed., p. 505.

Manual Labour.—In order to determine whether a person is engaged in "manual labour" within the meaning of sec. 10 of the Employers

and Workmen Act, 1875, it is necessary to look at such person's real and substantial employment, not what he may be called upon to do incidentally in the course of his employment (*Bound* v. *Lawrence*, 1891, 61 L. J. M. C. 21). Therefore a grocer's assistant, the substantial part of whose employment is to sell and deliver goods to customers, although he may be incidentally engaged in lifting heavy goods, is not a person engaged in "manual labour" (*ibid.*); nor is an omnibus conductor (*Morgan* v. *London General Omnibus Co.*, 1884, 13 Q. B. D. 832), nor a tramcar driver (*Cook* v. *North Metropolitan Tramways Co.*, 1887, 18 Q. B. D. 683).

Manufacture; Manufacturing Process. — See PATENTS; FACTORIES AND WORKSHOPS.

Manure and Cattle Food.—1. Provision is made by the Fertilisers and Feeding Stuffs Act, 1893 (c. 56), against adulteration of these commodities. See FERTILISERS AND FEEDING STUFFS.

2. The deposit of manure on or beside a highway can be summarily dealt with under the Highway Act, 1835 (c. 50, ss. 72, 73), and sec. 51 of the Highway Act, 1864 (c. 101, s. 50). See Pratt on *Highways*, 14th ed., 209, 215, 382.

Deposits of manure even on private premises, if offensive, are dealt with as nuisances under the Public Health Acts, and their periodical removal can be required and compelled under secs. 49, 50, 101 of the Public Health Act, 1875, and in London under secs 35, 36 of the Act of 1891 (c. 76).

These remedies are cumulative upon the ordinary, civil, and criminal remedies for public or private nuisance caused by such deposits (see *Knight* v. *Gordon*, 1868, 19 L. T. 673; *Cardell* v. *New Quay Local Board*, 1875, 39 J. P. 742; *Swain* v. *Great Northern Rwy. Co.*, 1864, 33 L. J. Ch. 399).

Map.—See COPYRIGHT.

Marches, Court of.—See COURT OF MARCHES.

Mare Liberum; Mare Clausum—Historic names which have descended from the great controversy of Grotius and Selden on the freedom of the sea. In his *Mare Liberum* Grotius claimed that the open sea was not susceptible of appropriation, and in *Mare Clausum* Selden endeavoured to prove that the contrary contention was supported by the practice of nations. The controversy may be said to have come to an end with the publication of *De Dominio Maris*, in which Bynkershoek propounded the theory of the cannon-shot limit, which has since been universally admitted as the extent to which open sea may be legally appropriated by adjacent States.

The old controversy flickered up once more, early in the present century, in connection with Behring's Sea and Alaska, then Russian territory; and an attempt was recently made again by the United States, as successors to Russian dominion over Alaska, to claim beyond the Bynkershoek limit, but ineffectually. See BEHRING SEA FISHERIES CASE; FRANCONIA CASE; FREEDOM OF THE SEA; TERRITORIAL WATERS.

Margarine.—The sale of substances made to resemble or replace butter is regulated by the Margarine Act, 1887 (50 & 51 Vict. c. 29), which is dealt with under ADULTERATION, vol. i. p. 153.

Marginal Note.—It seems that marginal notes in an Act of Parliament are not to be relied upon in construing the Act. In the case of *Claydon* v. *Green*, 1868, L. R. 3 C. P. at p. 521, Willes, J., said: "It appears from Blackstone's *Commentaries*, vol. i. p. 183, that formerly at one stage of the bill in Parliament it was ordered to be engrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849, when it was discontinued, without, however, any statute being passed to warrant it (see May, *Parliamentary Practice*, 3rd ed., p. 382). Since that time the only record of the proceedings of Parliament is to be found in the copy printed by the Queen's printer. But I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the Act, the marginal notes, and the punctuation, not as forming part of the Act, but merely as *temporanea expositio*. The Act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament." In the case of the *A.-G.* v. *Great Eastern Rwy. Co.*, 1879, 11 Ch. D. at p. 461, in the course of the argument Bramwell, L.J., said that marginal notes could not properly be looked at, and that some were grossly inaccurate; and Baggallay, L.J., stated that the House of Commons did not consider marginal notes. In *Sutton* v. *Sutton*, 1882, 22 Ch. D. p. 513, Jessel, M. R., said that the dictum in *In re Venour's Settled Estates*, 1876, 2 Ch. D. 525, that marginal notes appeared on the Rolls of Parliament, and consequently formed part of the Act, was not strictly correct, and that it could not be laid down that they are always on the Roll.

In the revised edition of the statutes the marginal notes are revised throughout, so as to bring them into more exact accordance with the text.

[*Authorities.*—See Hardcastle on *Statutes*, 2nd ed.; Maxwell, *Interpretation of Statutes*, 3rd ed.]

Marine Boards.—See MERCHANT SHIPPING.

Marine Insurance.

TABLE OF CONTENTS.

I. ORIGIN AND DEVELOPMENT . 133
II. ITS SCOPE 134
III. ITS SUBJECTS 135
IV. WHO CAN BE INSURED . . 135
(1) *Insurable Interest* . 135
(2) *Gaming and Wagering Policies* . . . 136
(3) *Interest in (a) Ship, (b) Freight, (c) Goods, (d) Profits and Commissions, (e) Liabilities* . 136
(4) *Where there is no Interest* . . . 139
(5) *Defeasible Interest* . 140
(6) *Partial Interest* . . 140
(7) *Other Interests* . . 140
(8) *Extent of Interest* . 141
(9) *Interest of Assignees* . 142
(10) *Interest of Assured's Agents* . . . 142
V. WHO MAY BE INSURERS . 143
(1) *Individuals* . . . 143

(2) *Corporations and Partnerships* . . . 143
(3) *Mutual Insurance Clubs* 143
(4) *Insurer's Agents* . . 145

VI. EXTENT OF INSURANCE . . 146
(1) *Insurable Value* . . 146
(2) *Insurable Value for Open and* . . 146
(3) *Valued Policies* . . 148

VII. DOUBLE INSURANCE . . 149

VIII. PRELIMINARIES OF THE CONTRACT 150
(1) *Disclosure* . . . 150
(2) *Representations* . . 153
(3) *The Slip* . . . 156

IX. FORM OF THE CONTRACT . 157
(1) *Statutory and Common Law Requisites* . . 157
(2) *Voyage and Time Policies* . . . 159
(3) *Stamp Provisions* . 159
(4) *Designation of Subject of Policy and interest in it* 161
(5) *Floating Policy* . . 162
(6) *Continuing Policy* . 162
(7) *Lloyd's Policy* . . 163
(8) *Alterations in the Policy* 164

X. WARRANTIES, OR CONDITIONS OF THE CONTRACT . . 164
(1) *Generally* . . . 164
(2) *Express Warranties* . 165
(3) *Implied Warranties* . 168
(*a*) *Seaworthiness* . 169
(*b*) *Legality* . . 172

XI. APPLICATION OF THE POLICY . 173
(1) *Beginning of Risk on* (*a*) *Ship*, (*b*) *Freight, and* (*c*) *Goods* . . 173
(2) *Abandonment of Voyage* 177
(3) *Change of Voyage* . 178
(4) *End of Risk on* (*a*) *Ship*, (*b*) *Freight and Goods* . . . 178

XII. EFFECT OF THE POLICY . . 181
(1) *Losses covered by the Policy* . . . 181
(2) *Total Losses* . . 183
(*a*) *Actual*—(1) *by Destruction*, (2) *Damage*, (3) *Deprivation* 183
(*b*) *Constructive*—(i.) *Ship*, (ii.) *Goods*, (iii.) *Freight* . 186
(3) *Abandonment*—(*a*) *its Requisites and* (*b*) *its Effects* . . . 192
(4) *Partial Losses* . . 195
(*a*) *Averages* . . 195
(*b*) *Salvage Charges* . 196
(*c*) *Particular Charges* 196

XIII. MEASURE OF INDEMNITY . 196
(1) *Total Losses* . . 197
(2) *Partial Losses* . . 197
(3) *Memorandum Losses* . 200
(4) *Successive Losses* . . 202
(5) *Sue and Labour Clause* 202
(6) *Liabilities to Third Persons* . . . 203

XIV. RIGHTS OF THE PARTIES . 203
(1) *Rights of Assured* . 203
(2) *Rights of Underwriter* . 206
(3) *Adjustment of the Policy* 207

XV. ASSIGNMENT OF THE POLICY . 208

I. ORIGIN AND DEVELOPMENT.

The place and time when marine insurance was first practised is uncertain. It was unknown to the Rhodians, Phœnicians, Greeks, and Romans, and is not mentioned in the early maritime codes of Europe, such as the Consolato del Mare, the laws of Oleron, or the laws of Wisbuy. It is generally supposed to have been invented in Italy about the thirteenth century, and was introduced into England by the Lombards. It has certainly been connected with Lombard Street and the Royal Exchange for three centuries or more; according to Malyne (writing in 1622), in every policy made at Antwerp, and in the Low Countries down to that date, there was a clause that "it shall be in all things the same as policies made in Lombard Street in the City of London"; and the present statutory policy still contains a clause that "this policy of insurance shall be of as much force and effect as the surest hitherto made in Lombard Street or in the Royal Exchange, or elsewhere in London." The Statute 43 Eliz. c. 12 (1601) speaks of it having been time out of mind an usage among merchants both of this realm and of foreign nations when they make any great adventure (especially into remote parts), to give some consideration of money to other persons to have from them assurance made of their goods and merchandises, ships, and things adventured (or some part thereof), at such rates and in such sort as the parties assurers and parties assured can agree, which course of dealing is commonly called a policy of assurance. The term "policy of assurance" is clearly derived from the Italian *polizza* and *assicurazione*, and this indicates the origin of the instrument.

The practice and business of marine insurance were at all events so extensive in England in 1601, that a special tribunal was then established for trying summarily disputes

arising on marine policies. Previously to that time such disputes had been referred by agreement to "certain grave and discreet merchants appointed by the Lord Mayor of the City of London, as men, by reason of their experience, fittest to understand and speedily decide such causes," who seem to have been known as Commissioners of the Office of Assurance in the Royal Exchange. This tribunal was to consist of the following Commissioners, namely, the Judge of the Admiralty Court, the Recorder of London, two doctors of civil law, two common lawyers, and eight merchants, any five of whom were empowered together to hear and determine all causes on policies of assurance arising in London: they could examine on oath and commit to prison for disobedience: they were to meet every week at least, and were to receive no fee for any matter concerning their commission: and an appeal was given by Bill to the Court of Chancery. In 1662 this Court was again dealt with by statute, three Commissioners as a quorum being substituted for five, and power being given to punish witnesses for wilful delay, and to direct Admiralty commissions to issue for the examination of witnesses beyond the sea, and one Commissioner being enabled to examine witnesses before they went to sea, on notice being given to the adverse party (13 & 14 Car. II. 23).

The Common Law Courts, however, interfered with the new Court: they prohibited its hearing a cause of life insurance, on the ground that it only had power to decide causes of assurance upon merchandises; and decided that it was no bar to an action on a policy of assurance at common law to say that the plaintiff had sued the defendant for the same cause in the Assurance Court, and that it had been there determined; and as a result, the Court languished, and soon became quite obsolete. There are few reported cases on policies of insurance in the Courts of law between 1601 and 1756, but under Lord Mansfield numerous cases came before the Courts; and most of the now recognised principles of insurance law were first enunciated by him, gathered, not from English common law, but from the ancient marine laws and the practice of merchants (Park, *Insurance* (1787), Introduction; Marshall, *Insurance* (1861), *ibid.*).

Questions on policies of insurance are now generally determined by the lately-established Commercial Court (*q.v.*), but sometimes come before the Admiralty Court. A code has been drafted and introduced before Parliament; and although it has not as yet become law, the whole subject is dealt with in this article on the lines of the Bill, not only because it will probably become law, but chiefly because "it endeavours to reproduce as exactly as possible the existing law," by summarising the case law and incorporating the statutes relating to the subject. Our common law being the same as that of the United States, our insurance law, on a great many points, agrees with that of the United States; and their decisions, being for the most part contemporary with our earlier decisions, and having often proved anticipatory of our later decisions, as well as being largely referred to therein, are authorities which may guide (though they cannot bind) the decisions of our Courts on points not yet brought before them, if in accordance with the recognised principles of insurance law. The works of Phillips (who, per Brett, L.J., is, "of all the great text authorities upon insurance law, the one most to be considered," *Bradford* v. *Symondson*, 1881, 7 Q. B. D. 463) and Arnould are also regarded as standard authorities in our Courts. Finally, in marine insurance, as in other branches of the law merchant, the usage and practice of mercantile men is allowed to govern very largely the meaning of the contract, provided that they do not run counter to legal principles. For the procedure and evidence in marine insurance cases, reference must be made to Arnould, *Insurance* (Part. IV.).

II. Scope of Marine Insurance.

A contract of marine insurance is a contract of indemnity, whereby the insurer undertakes to indemnify the assured in the manner and to the extent thereby agreed against marine losses, *i.e.* losses incident to marine adventure (Marine Insurance Bill, 1897, s. 1). Such indemnity, however, does not put the assured in the same position in which he would have been if no loss had taken place; it only replaces him in the position in which he was at the beginning of the adventure (Arnould, 296, 297, and 298).

A lawful marine adventure is when any property is exposed to maritime perils, or when any pecuniary benefit or security is endangered by exposure to maritime perils, or when any liability to a third party is incurred by persons interested in property so exposed. Maritime perils are the perils consequent on or incidental to the navigation of the sea, and comprise perils of the seas, fire, war perils, pirates, rovers and thieves, captures, seizures

and restraints, and detainments of princes and peoples, jettisons and barratry, and any other perils designated by the policy (s. 3). For details of these, see FIRE (IN COMMERCIAL CONTRACTS); PERILS OF THE SEA; PRINCES AND PEOPLES; BARRATRY; CARGO; PIRATES.

The general rule is that the underwriter (or insurer) in a sea policy insures only against sea risks (Arnould, *Marine Insurance*, 393); and if the policy is meant to cover other risks, they must either be specified in the policy or implied by usage, *e.g.* losses on inland waters or on a land adventure which is incidental to a sea voyage (s. 2). Instances of such risks being expressed in the policy are goods insured from Shanghai to Marseilles, and thence by rail across France, and so to London (*Rodocanachi* v. *Elliott*, 1873, L. R. 8 C. P. 649); goods insured at and from London to Harwich by road, and thence to Rotterdam (*Boehm* v. *Combe*, 1813, 2 M. & S. 172; 14 R. R. 620); goods insured at and from Melbourne to Sydney, and thence to England, and lost while warehoused at Sydney (*Davies* v. *National F. & M. I. C. of New Zealand*, [1891] App. Cas. 485); and a land risk may be specially excepted which might otherwise be covered by the wording of the policy, *e.g.* "no interior risk" (*Hewitt* v. *U. M. I. C. of Scandinavia*, 1892, 8 T. L. R. 402). Examples of such risks being covered by usage are conveyance of goods in public lighters from the ship to the wharf, and *vice versâ*, in the port of London, or from Cronstadt to St. Petersburg up the Neva (Arnould, 391); or the landing or warehousing of goods for a temporary purpose connected with the voyage (*Pelly* v. *Roy. Ex. A. C.*, 1757, 1 Burr. 341), which, in the absence of usage, is not so protected (*Harrison* v. *Ellis*, 1859, 7 El. & Bl. 410). Adventures analogous to marine adventures, such as the launch of a ship, may be insured by a marine policy, as also has been the conveyance of securities by post abroad (*Baring Brothers* v. *Marine I. C.*, 1894, 10 T. L. R. 276).

III. SUBJECTS OF MARINE INSURANCE.

According to the classification given above, the subjects of marine insurance include property, pecuniary benefits, and pecuniary liabilities exposed to sea risk.

The first class comprises ships with their fittings and contents, goods or merchandise, deck cargo, and personal effects. The second class comprises freight (*q.v.*), passage money, profits and commissions, master's wages and profits, and perhaps the crew's, profits on shares in companies engaged in maritime adventure, *e.g.* laying an Atlantic cable (*Wilson* v. *Jones*, 1867, L. R. 2 Ex. 139), bottomry and respondentia loans (see BOTTOMRY), mortgages, and disbursements on account of ships and cargoes. The third class includes such liabilities as those of a shipowner, in case of a collision between his ship and another (M. S. A. s. 506), or in case of shipwreck, to forward passengers to their destination (M. S. A. s. 335), and he may insure the average contribution due to him by cargo-owners for salvage of ship and cargo if he enters into a recognisance to that effect (*Briggs* v. *Merchant Traders' Association*, 1849, 13 Q. B. 167); or the liability of a carrier for the goods intrusted to his care (*Crowley* v. *Cohen*, 1832, 3 Barn. & Adol. 478); or of a lighterman in the like case (*Joyce* v. *Kennard*, 1871, L. R. 7 Q. B. 78); and for other instances see *Insurable Interest*, below.

IV. WHO CAN BE INSURED.

(1) *Insurable Interest.*—It is one of the conditions essential to a policy (as being a contract of indemnity only) that the person for whose benefit it is made should have an interest in the subject of insurance, which is called

an *insurable interest.* A person is interested in a subject of insurance who stands in any relation, legal or equitable, to the adventure, in consequence of which he benefits by the safety or due arrival of insurable property, or is prejudiced by loss or damage thereto, or by the detention thereof, or incurs any liability in respect thereof (Marine Insurance Bill, s. 5 (2)). This definition summarises that given by Lawrence, J., in *Lucena* v. *Craufurd* (1806, 2 Bos. & P. N. R. 269; 6 R. R. 623).

(2) *Gaming and Wagering Policies.*—Before going on to describe the various kinds of insurable interest, the corollary of this necessity for insurable interest in a marine policy may be stated, namely, that every policy which is not founded on an insurable interest is void, as being purely speculative, or, as it is called, a *gaming* or *wagering* policy. Gaming or wagering policies were legal at common law, though regarded as distinct from policies in the common form (Lloyd's), till 1746, when such policies made on British ships and goods were declared void by statute (19 Geo. II. 37); but this Act did not forbid such policies on foreign ships and goods (*Thellusson* v. *Ketchen*, 1780, Doug. 315); and it allowed two specific exceptions to the rule as to British ships, viz. (1) policies on British privateers, and (2) policies on effects from any ports or places in Europe and America in the possession of the Crowns of Spain and Portugal (*De Costa* v. *Firth*, 1766, 4 Burr. 1966; *Murphy* v. *Bell*, 1828, 4 Bing. 567). A judgment of the Exchequer Chamber established the rule that every policy not expressed to be otherwise, is to be taken to be a policy on interest; and unless the assured in a policy, whether on British or foreign ships and goods which does not aver want of interest, can prove an interest in the thing insured, such policy is void (*Cousins* v. *Nantes*, 1811, 3 Taun. 513; 12 R. R. 696); and consequently every wagering policy must show on its face that it is such, or it will be void (Arnould, 122). A statute of 1845, however (8 & 9 Vict. c. 109), provides generally that all contracts by way of gaming or wagering are void (s. 18), and under the Declaration of Paris in 1856 the use of privateers in war was abolished. It seems likely, therefore, that the exceptions to the Act of 1746 are impliedly repealed, and that all gaming and wagering policies are void; and the codifying Bill takes this view (s. 4 (1)).

A policy is declared by the Act of 1746 to be gaming or wagering where it is expressed to be made on ships or goods, "interest or no interest," or "without further proof of interest than this policy," or "without benefit of salvage to the insurer" (s. 1, reaffirmed in s. 4 (2) of the Bill; *Lowry* v. *Bourdieu*, 1780, 2 Doug. 468, policy on bond given by the captain of a ship; *Kulen Kemp* v. *Vigne*, 1786, 1 T. R. 304; 1 R. R. 205, policy on money expended in reclaiming ship and cargo after capture; *Murphy* v. *Bell*, *ante*, policy on goods); and "goods" include profits and commissions (*Smith* v. *Reynolds*, 1856, 1 H. & N. 221; *De Mattos* v. *North*, 1868, L. R. 3 Ex. 185; *Allkins* v. *Jupe*, 1877, 2 C. P. D. 375; *Berridge* v. *Man. On. I. C.*, 1887, 17 Q. B. D. 346); although the words "without benefit of salvage" are inserted by the insurer without the instructions of the assured (*Mortimer* v. *Broadwood*, 17 W. R. 153); and "honour" policies are thus void (*Roddick* v. *Mutual Indemnity M. M. I. C.*, [1895] 2 Q. B. 380). The certifying bill adds a proviso that where a subsequent policy is effected on the same subject-matter and interest, it may be effected without benefit of salvage to the insurer (s. 4 (2)).

(3) The various kinds of insurable interest may be considered under the heads of the subjects of insurance before mentioned, viz. (*a*) ship, (*b*) freight, (*c*) goods, (*d*) profits, and (*e*) liabilities.

(*a*) *Ship.*—The following persons have an insurable interest in the ship:

shipowners whether they are registered or not, equitable as well as legal (M. S. A. 1894, s. 57; *Chasteauneuf* v. *Capeyron*, 1882, 7 App. Cas. 127, under the former M. S. A.), even though they let their ship to a charterer who makes himself responsible for her full value (*Hobbs* v. *Hannam*, 1811, 3 Camp. 93; 13 R. R. 764), or one part owner leases her to another part owner who makes himself liable for damage to her (so held in United States, *Oliver* v. *Greene*, 1807, 3 Mass. 133); and a part owner who has paid for the whole ship which was registered half in his name and half in that of his co-owner, and by his authority insures her for her full value, has an insurable interest in the whole ship (*Prov. I. C. of Canada* v. *Leduc*, 1874, L. R. 6 P. C. 224). Charterers can insure a ship if they have contracted to pay for her in case of loss (*Oliver* v. *Greene*, above), or if they have undertaken to insure her (so held in United States, *Bartlett* v. *Walter*, 1816, 13 Mass. 267); vendors of a ship if they assume a risk in connection with her (*Reed* v. *Cole*, 3 Burr. 1512); mortgagors (*Ward* v. *Beck*, 1863, 32 L. J. C. P. 113; *The Innisfallen*, 1866, L. R. 1 Ad. & Ec. 72); mortgagees (*Irving* v. *Richardson*, 1831, 2 Barn. & Adol. 193; s. 13 of Bill); bottomry bondholders (s. 10 of Bill); and creditors such as necessary men (see NECESSARIES, SHIP'S).

(*b*) *Freight.*—*Primâ facie* shipowners alone have an insurable interest in freight (*q.v.*) (*Camden* v. *Anderson*, 1794, 5 T. R. 709), and advances on account of freight subject to risk of voyage (*Hall* v. *Janson*, 1855, 4 El. & Bl. 500); or assignees of the ship (*Morrison* v. *Parsons*, 1810, 2 Taun. 407; 11 R. R. 622); but charterers can insure freight if they recharter the ship or put her up as a general ship, or if they carry their own goods, they can insure the profit they expect to make, and their insurable interest extends to the full amount of the freight and not merely to the excess of that freight over what they have to pay the shipowner (Arnould, 61). Charterers may also insure dead freight which they are liable to pay under the charter-party (*Puller* v. *Staniforth*, 1809, 11 East, 232; 10 R. R. 486), and also the advance freight (see FREIGHT), for it is their risk; and a person has an insurable interest if he advances freight, in so far as it is not repayable in case of loss (s. 11 of Bill). Assignees of freight have an insurable interest in it, and if making advances, in them also (*Lindsay* v. *Gibbs*, 1856, 22 Beav. 522; *Willis* v. *Palmer*, 1859, 7 C. B. N. S. 340).

(*c*) *Goods.*—Generally the insurable interest in goods vests in the person who has the right of property (Arnould, 69); but, though "risk and property generally go together, they are not necessarily associated, and the risk only will suffice to bear the insurance" (Blackburn, J., *Lloyd* v. *Spence*, 1872, L. R. 7 Q. B. 299; Lord O'Hagan, *Anderson* v. *Morice*, 1876, 2 App. Cas. 742). Shippers of goods have an insurable interest if they take the risk of goods shipped by them. "The fact of a person being named as shipper (or assignee) in the bill of lading is *primâ facie* evidence of insurable interest, but is not conclusive of the point; if he is really only an agent and nothing more, *i.e.* has made no advances and has no liens against the shipped goods, he has no insurable interest. A mere agent without possession or lien does not have insurable interest to the extent of the value of the goods simply because his name appears in the bill of lading, and not his principal's, and the general rule is that to constitute an interest insurable against a peril it must be an interest such that the peril would by its proximate effect cause damage to the assured" (Willes, J., *Seagrave* v. *Union M. I. C.*, 1866, L. R. 1 C. P. 305).

Purchasers have an insurable interest in goods if the shipment be at their risk, *e.g.*, *f. o. b.* (*q.v.*) even though the goods are consigned to the vendors and the bills of lading are to be retained by them till the purchase

money be paid (*Inglis* v. *Stock*, 1885, 10 App. Cas. 270). If a seller exercises his right to stop goods *in transitu* (see STOPPAGE IN TRANSITU) after the property in them has passed, the purchaser's insurable interest continues, for stoppage *in transitu* does not rescind the contract but only revests the lien (Lord Blackburn, *Kemp* v. *Falck*, 1882, 7 App. Cas. 581). Where by the terms of the contract the property in the goods passes to the purchaser, or where he takes upon himself the risk in connection with them, the purchaser and not the seller has an insurable interest in them (*Joyce* v. *Swann*, 1864, 17 C. B. N. S. 84; *Seagrave* v. *Union M. I. C.*, *ante*). The fact of the existence of a contract to buy, even though the property in the goods has not passed, is, it seems, enough to give the intending purchaser an insurable interest (Willes, J., *ibid.*). An agreement to purchase followed by specific appropriation by the vendor of a particular cargo and acceptance of it by the vendee gives the latter an insurable interest (*Sparkes* v. *Marshall*, 1836, 2 Bing. N. C. 761); and the property may pass and the contract be complete although the price has not been definitely settled (*Joyce* v. *Swann*, *ante*). But unless the contract be complete there is no insurable interest in the buyer (*Anderson* v. *Morice*, *ante*). Carriers, warehousemen, trustees, bankrupts in possession of after-acquired property by leave of their assignees, consignees, factors, agents, mortgagors, and mortgagees may all have an insurable interest in goods (Willes, J., *Seagrave's* case, *ante*).

(*d*) *Profits.*—A shipowner has an insurable interest in the profits which he expects to make on a voyage by a cargo which he intends to ship, and so has a charterer. "Profits may be insured on the ground that they form an additional part of the value of the goods in which the plaintiff has already an interest" (Parke, B., *Stockdale* v. *Dunlop*, 1840, 6 Mee. & W. 224; Lord Ellenborough, *Eyre* v. *Glover*, 1812, 16 East, 218; 13 R. R. 801). Two conditions must be complied with in order to recover under a policy on profits—(*a*) the goods in which the profits are expected must legally belong to the assured, *i.e.* by a valid contract (*Stockdale* v. *Dunlop*, *ante*); (*b*) it must be shown that profits would have been made on the goods if they had arrived (*Hodgson* v. *Glover*, 1805, 6 East, 316; 8 R. R. 495). The goods from which the profits are expected must also generally be shown to have been exposed to the perils in the policy, unless the policy expressly covers profit on goods not actually put on board, but only ready and contracted to be so; and by so wording the policy, a person buying goods of another which are *to arrive*, and afterwards contracting to sell them to a third party at a profit, can insure such profit (*M'Swiney* v. *Roy. Ex. A. C.*, 1850, 14 Q. B. 646; *Halhead* v. *Young*, 1856, 6 El. & Bl. 312). In the United States it is not necessary to show that there would actually have been a profit in order to constitute an insurable interest, though the assured must have an interest in the thing from which the profit is to be derived (Phillips, 318 and 319, quoting decisions). The law with regard to *commissions* is the same, except that the insurable interest does not depend on the ownership of the goods, but upon the control or sale of them (*King* v. *Glover*, 1806, 2 Bos. & P. N. R. 206; 9 R. R. 638, commissions of a captain of an African trader).

(*e*) *Liabilities.*—These include the liability of a shipowner for damage done by his ship's negligent navigation to another, or to send on the passengers in his ship if she is wrecked (M. S. A. 1894, ss. 503 and 506, 333 and 335); and that of a carrier or other bailee for the goods put in his charge (s. 13 (1) of the Bill; *Crowley* v. *Cohen*, 1832, 3 Barn. & Adol. 478; *Joyce* v. *Kennard*, 1871, L. R. 7 Q. B. 78; *Stephens* v. *Australasian I. C.*, 1872, L. R. 8 C. P. 18; *Tate* v. *Hyslop*, 1885, 15 Q. B. D. 368).

(4) *Where there is no Interest.*—If, however, the assured has not a legal or equitable right or liability in respect of the thing to be insured, he has no insurable interest in it; thus he cannot insure ship, goods, or freight which do not belong to him, or in connection with which he takes no risk, and he cannot insure freights or goods which are not his (s. 5 (3) of the Bill). A bill of exchange drawn on shipowners to cover money borrowed for the ship's use in a foreign country does not give the acceptor an insurable interest in the ship, for it gives no lien (*Tasker* v. *Scott*, 1815, 6 Taun. 233; 16 R. R. 608); nor do bills payable on a certain contingency, *e.g.* so many days after a ship's arrival outwards (*Palmer* v. *Pratt*, 1824, 2 Bing. 185). A mere expectation of benefit or loss will not constitute an insurable interest. Thus captors have an insurable interest in any enemy's ships of which they make a prize in time of war, under a Prize Act vesting the property therein in them after condemnation, subject to the right of the Crown to release and of the Prize Court to restore them (*Stirling* v. *Vaughan*, 1809, 11 East, 619; 11 R. R. 276); but they have no insurable interest in ships taken otherwise unless they declare that interest to be in the Crown (*Lucena* v. *Craufurd*, 1806, 2 Bos. & P. N. R. 280; 6 R. R. 623), or in themselves if they are liable to have to restore the captured property with the costs and charges accruing thereto (*Boehm* v. *Bell*, 1799, 8 T. R. 154; 4 R. R. 620; *Routh* v. *Thompson*, 1809, 11 East, 428; 10 R. R. 539); and Lord Mansfield's former opinion that "possession of a captured ship coupled with the expectation of future benefit founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounts to an insurable interest" (*Le Cras* v. *Hughes*, 1782, 3 Doug. 81, *Omoa* case), has been held to be unsound (*Lucena* v. *Craufurd*, *ante*). Similarly the expectation of a bounty which by a French law was payable by the French Government to whalers fishing in the Pacific or south of Cape Horn within lat. 62°, at least if they returned with half their burden in cargo or after sixteen months' navigation, was held not to be insurable (*Devaux* v. *Steele*, 1840, 6 Bing. N. C. 358); and so a policy on commissions valued at £1000 to arise upon the sale in Dublin of produce to be shipped at Jamaica for the homeward voyage of a ship insured for a round voyage from Bristol to St. Thomas, Jamaica, and Dublin, was held to be void, on the ship being captured between St. Thomas and Jamaica but being released and coming home in ballast because she found no cargo at Jamaica, as being "an insurance of the expectation of an expectation" with no interest ever on board (*Knox* v. *Wood*, 1808, 1 Camp. 543; 10 R. R. 746). Another insurance which is void for want of a legal interest is a policy on the property of alien enemies, *i.e.* subjects of a foreign State at war with that of the insurer (see *post*, *Warranties—Legality*).

The insurable interest of the assured in the subject-matter insured must be existing before and at the time of the loss (s. 6 (1) of the Bill), but need not exist at the time of making the policy (*Lower Rhine, etc., I. A.* v. *Sedgwick*, 1898, 14 T. L. R. 226). Thus if the interest be declared to be in three persons as part owners of a ship, and before the loss one of them has transferred his share to one of the others, it has been held that there was no interest in them jointly (*Powles* v. *Innes*, 1843, 11 Mee. & W. 10). If, however, the thing is insured "lost or not lost," it is immaterial that the assured has not acquired his interest till after the loss, if at the time of effecting the policy he was not aware of the loss (s. 6 (1) of the Bill; and see LOST OR NOT LOST). If an assured has no interest at the time of loss he cannot acquire interest by any act or election after he is aware of the loss (s. 6 (2) of the Bill). An apparent

example of his doing so is where he declares a loss on a policy which has been already effected on goods and ships "to be declared and valued hereafter," when he may declare the subject to which the policy is to apply either before or after loss, and appropriate the loss thereto (*Harman* v. *Kingston*, 1811, 3 Camp. 150; 13 R. R. 775; *Kewley* v. *Ryan*, 1794, 2 Black. H. 334; 3 R. R. 408); but in such a case the assured has an insurable interest at the time of loss, though it is not complete till the subject is specified.

(5) A *defeasible* interest is insurable, and so is a contingent or inchoate interest (s. 7 of the Bill). Thus the interest of a captor in his prize is insurable, though it may be defeated by the Crown releasing it or the Prize Court restoring it (*ante*); and where a ship does an illegal act for which she is liable to seizure and forfeiture by her Government, her owner has an insurable interest in her till seizure takes place (*Pipon* v. *Cope*, 1808, 1 Camp. 434; 10 R. R. 720; so held in United States, *Wilkes* v. *People's I. C.*, 1859, 19 N. Y. 184). "An inchoate interest, though imperfect till a given contingency shall take place, is nevertheless insurable" (*Lucena* v. *Craufurd*, *ante*). Thus where a loss of freight took place under a time policy which must have expired before the voyage could be completed and the freight earned, it was held to be covered, such freight being insurable though inchoate (*Michael* v. *Gillespy*, 1857, 2 C. B. N. S. 627). Similarly executors have an insurable interest before probate is granted to them (Lord Ellenborough, *Stirling* v. *Vaughan*, 1809, 11 East, 629; 11 R. R. 276).

(6) A *partial* interest, whether in joint or in common or otherwise, is insurable (s. 8 of the Bill). Thus owners of shares in ships may insure them (*Powles* v. *Innes*, 1843, 11 Mee. & W. 10; *Prov. I. C. of Canada* v. *Leduc*, 1874, L. R. 6 P. C. 224); a person having several interests in cargo, viz. as partner to the extent of $\frac{7}{16}$, as consignee of the whole, and as having a lien on the whole for advances, can insure it all on his own account (*Carruthers* v. *Sheddon*, 1815, 6 Taun. 114); and an assured can insure part of his interest or the whole of his interest for only part of a risk (*Taylor* v. *Wilson*, 1812, 15 East, 324; 13 R. R. 488).

(7) *Other Interests.*—The insurer under a contract of marine insurance has an insurable interest in his risk, and may reinsure in respect of it (s. 9 (1) of the Bill), and such a contract of insurance is called a *reinsurance*; so has a lender on bottomry and respondentia (*q.v.*) (s. 10 (1) of the Bill). The master has an insurable interest in respect of his wages, personal effects on board, commission and share of the ship or cargo (*Duff* v. *Mackenzie*, 3 C. B. N. S. 16; *Hawkins* v. *Twizell*, 1858, 5 El. & Bl. 883; *King* v. *Glover*, 1806, 2 Bos. & P. N. R. 206; 9 R. R. 638); and the mate and seamen have been held to have an insurable interest in goods bought with their wages and shipped as merchandise, but not in their wages or an expected share in the proceeds of the voyage (*Webster* v. *De Tastet*, 1797, 7 T. R. 157; 4 R. R. 402; *The Lady Durham*, 1835, 3 Hag. Adm. 201). Since these decisions, however, the old principle that freight is the mother of wages, *i.e.* that no wages were earned unless the freight be earned, has been abolished; and with it has gone the only reason (public policy) for making seamen's wages uninsurable; and the Bill accordingly declares that they are insurable (s. (2)), though the opinion of Arnould is that they are still not so (90).

The assured has an insurable interest in the charges of any insurance which he has effected (s. 12 of the Bill; *Glaser* v. *Cowie*, 1813, 1 M. & S. 32); he has also an insurable interest in the solvency of his underwriter but owing to double insurance this is never resorted to (Arnould, 106; Phillips, 205).

(8) *The extent of insurable interest* in a thing insured is determined by the gross and not the net interest of the assured therein, and in some cases he may insure to cover other interests than his own. Thus a mortgagor has an interest in the full value of the thing insured, and not merely in the excess of its value over the mortgage debt, for even if it were lost he would still be liable therefor (*Alston* v. *Campbell*, 1779, 4 Bro. P. C. 476); and a transfer of a ship absolute in form may be shown to be meant only as a security, and so not to deprive its owner of his insurable interest (*Gardner* v. *Cazenove*, 1856, 1 H. & N. 433; *Ward* v. *Beck*, 1863, 32 L. J. C. P. 113). A mortgagee has an interest in the amount of his mortgage; and if he insures in his own name to cover the mortgagor's interest as well as his own, he may have an interest in respect of the value of the whole ship, and can recover the whole under a policy on "ship," though he will then hold the surplus beyond his debt as trustee for the mortgagor (*Irving* v. *Richardson*, 1831, 2 Barn. & Adol. 193; *Smith* v. *Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; s. 13 (2) and (3) of the Bill). A consignee who has an interest in a consignment may insure for the benefit of other persons interested as well as himself, and if so can insure up to the full value of his and their interests in the consignment, though he insures in his own name only (s. 13 (4) of the Bill, embodying *Elsworth* v. *Alliance M. I. C.*, 1873, L. R. 8 C. P. 596; Bovill, C.J., and Denman, J.; the United States law is the same, *De Forrest* v. *Fulton I. C.*, 1828, 1 Hall, 84). In order to have an "interest" in a consignment the consignee must have made advances or accepted bills against it, or have been instructed to sell it on commission, or have a general balance against the consignor (Arnould, 80 and 81; Phillips, 309 ff.; *Godin* v. *London Ass. Co.*, 1758, 1 Burr. 489; *Carruthers* v. *Sheddon*, 1815, 6 Taun. 14; *Hill* v. *Secretan*, 1798, 1 Bos. & Pul. 315; 4 R. R. 806; *Wolff* v. *Horncastle*, *ibid.* 316; 4 R. R. 808). A pledgee of the bill of lading from the consignee as security for advances has an insurable interest, and may sue in his own name on a policy made under his instructions, "for account of whom it may concern," and deposited with him as an additional security (*Sutherland* v. *Pratt*, 1843, 12 Mee. & W. 16).

"Naked" consignees, *i.e.* who have no lien on the consignment for advances and are not intrusted with it for sale on commission, may only insure in their own names on behalf of the consignors who may have previously authorised it, or afterwards ratify it, but not otherwise (*Lucena* v. *Craufurd*, *ante*, Lawrence, J., 307). Trustees being legal owners have an insurable interest to the full value of the thing insured (*Lucena* v. *Craufurd*, *ante*; *Waters* v. *Monarch Life A. C.*, 1856, 5 El. & Bl. 870).

The owner of insurable property still has an insurable interest in it to its full value although some third person may have agreed to indemnify him in case of loss (s. 13 (5) of the Bill). Thus a shipowner still insures his ship for her full value though he has let her to another person who makes himself responsible for her full value (*Hobbs* v. *Hannam*, 1811, 3 Camp. 93; 13 R. R. 764). So a person who has intrusted goods to a carrier or warehouseman who undertakes the same responsibility, can insure them (*Bochm* v. *Combe*, *ante*; *London, Liverpool, & Globe Insur. Co.* v. *North British Mercantile Insur. Co.*, 1877, 5 Ch. D. 569). This rule holds good also in *double insurance* (see *post*), which takes place when an assured insures property with two different insurers on the same subject, the same risk, and the same interest (Arnould, 327; Phillips, 359). In each case the assured has an insurable interest to the full value of the subject insured, and he may recover that full value under either policy. But as soon as he has recovered the full insurance under one policy, he cannot sue on the

other policy for more than the excess of the sum insured in such policy over the sum insured and recovered in the former policy; and the underwriters on the former policy are entitled to a *pro rata* contribution from those in the latter policy, and thus all the underwriters contribute to the payment made to the assured proportionately to their insurances. If a third person is liable to the assured for the safety of the goods, then the underwriter on them, on payment, becomes entitled to all the rights of the assured against such third person, or is *subrogated* to him; see *Total Loss, post.*

(9) *Assignment* by an assured of his interest in the subject of insurance does not carry with it assignment of the assured's rights under the policy unless there is an express or implied agreement with the assignee to that effect (s. 14 of the Bill). A policy being a personal contract on the part of the underwriters to the original assured, is not an incident of the property insured; and a purchaser of the subject of the policy, in order to obtain the benefit of it, must either have it assigned to him, or agreed to be held for his benefit (Arnould, 112; Phillips, 86 and 87). Thus if property insured is sold so that the assured retains no interest in it, and a loss happens, and after loss the policy is assigned to the purchaser, the assignment is ineffectual because it conveys no insurable interest (*Lynch* v. *Dalzell*, 1729, 4 Bro. P. C. 431). In order that a policy may be validly assigned before loss, and the assignee get an insurable interest, it is requisite that (*a*) the assignor should have an interest which he can assign under the policy, (*b*) the risk insured in the policy must be continuing, (*c*) there must be an insurable interest in the subject of the policy vested in the assignee and exposed to the perils during the risk in the policy (Arnould, 113). Thus where a shipper consigned goods to persons who insured "on account of consignor," and then assigned the bill of lading of the goods to another person *before* the insurance was made, the assignees were held to have no insurable interest; but on its afterwards appearing that the bill of lading was intended not as an assignment but only as a security, the consignee recovered (*Hibbert* v. *Carter*, 1787, L. T. R. 745; 1 R. R. 388; *Delaney* v. *Stoddart*, 1785, *ibid.* 22; 1 R. R. 139; *Powles* v. *Innes*, 1843, 11 Mee. & W. 10); and unless the policy be assigned or be agreed to be held for the benefit of the assignee before the loss, neither party can recover (*North of England Oil Cake Co.* v. *Archangel M. I. C.*, 1875, L. R. 10 Q. B. 249). This rule, however, does not apply to a transmission of interest by operation of law, namely, by death or bankruptcy, when the insurable interest vests in the legal representative.

The interest of the assignee and assignor under the policy may also be modified by their dealings with it; thus if a policy provide for return of premium (see *post*) at an intermediate port, and the cargo insured is sold with insurance to that port and is afterwards lost, the assignee cannot recover, for he has no insurable interest after that port (*Ionides* v. *Harford*, 1859, 29 L. J. Ex. 36). If a goods-owner sells a cargo for less than it is insured for, and assigns the policy only to a partial extent to the buyer, he cannot recover the excess of the insurance from the underwriter, though he may be entitled to it if paid by the underwriter (*Ralli* v. *Univ. M. I. C.*, 1861, 31 L. J. Ch. 20 and 313).

(10) *Interest of Assured's Agents.*—Besides the foregoing different kinds of "assured" who can enter into a policy, policies can also be effected by agents for the assured (the Bill defining "assured" as including the agent of the assured, s. 90). In order to do so, agents must have an authority from their principals—express, implied, or ratified. Express authority may be revoked before the policy is signed though after the slip is executed

(see *post*; *Warwick* v. *Slade*, 1811, 3 Camp. 127; 13 R. R. 772). Implied authority is possessed by a partner, who can insure partnership property on behalf of the firm and bind his copartners for premiums and commission (*Hooper* v. *Lusby*, 1814, 4 Camp. 66), but not by a part owner, though he is the ship's husband (*Bell* v. *Humphries*, 1818, 2 Stark. 348; *French* v. *Backhouse*, 1771, 5 Burr. 2227; *Robinson* v. *Gleadow*, 1835, 2 Bing. N. C. 156), nor by a consignor except by course of business or usage of trade to that effect; but a consignee may insure, as seen above, if interested in the property (Arnould, 161; *Wolff* v. *Horncastle*, 1798, 1 Bos. & Pul. 316; 4 R. R. 808), and a general agent of a foreign merchant may insure if he has possession of it with a general authority, and discretion as to the management and disposal of it under circumstances in which his principal cannot instruct him (Phillips, 1864; Arnould, 162). An agent may also be impliedly authorised to insure property placed in a peculiar situation, *e.g.* a supercargo, where the cargo has been landed and is waiting to be shipped to a market (*De Forrest* v. *Fulton I. C.*, 1828, 1 Hall, N. Y. 84; Phillips, 1856), or a prize agent empowered to send ships home (*Robertson* v. *Hamilton*, 1811, 14 East, 522; 13 R. R. 303), or a merchant who sends back goods to a foreign correspondent of whom he has ordered them, because they are not in accordance with his order (*Cornwall* v. *Wilson*, 1750, 1 Ves. Sen. 511).

A ratified authority is equal to a prior authority; and if the principal, on learning that an agent has insured his property without orders, adopts it, it is the same as if he had ordered it himself, *e.g.* captor's insurance on behalf of the Crown ratified by the Crown (*Routh* v. *Thompson*, 1811, 13 East, 274; 10 R. R. 539; *Stirling* v. *Vaughan*, 1809, 11 *ibid.* 619; 11 R. R. 276); or that of a clerk of a foreign consignee ratified by his employer (*Barlow* v. *Leckie*, 1819, 4 Moore Ex. 8); or that of a part owner (*Robinson* v. *Gleadow*, above). A policy made by an agent, in order to be valid, need not be ratified during the risk by a principal, nor before the latter knows of the loss (*Hagedorn* v. *Oliverson*, 1814, 2 M. & S. 485; 15 R. R. 317; *Williams* v. *North China I. C.*, 1876, 1 C. P. D. 757; s. 85 of the Bill); but knowledge of what has happened is essential to ratification; and a general order to insure, given before knowing of a particular insurance, but not received by the person making the insurance till after the policy has been made, is not a ratification (*Bell* v. *Janson*, 1813, 1 M. & S. 201). See BROKER (INSURANCE).

V. WHO MAY BE INSURERS.

Policies of marine insurance may be accepted, or *underwritten* as it is called, by individuals, partnerships or corporations, mutual insurance associations or clubs of shipowners, or agents.

(1) In the first case the Lloyd's policy (see *post*) is generally used, and adapted to the requirements of the particular insurance. The underwriters have only a several liability, and not a joint one, and each is not liable for anything beyond his own subscription.

(2) In the second case a joint liability is created, and a policy much resembling the Lloyd's policy is used (*Brett* v. *Beckwith*, 1857, 26 L. J. Ch. 130); but a company must be constituted for the purpose of issuing marine policies, or its policies will be invalid, and the premiums paid may be recovered back (*Burges* v. *Stock*, 1862, 2 John. & H. 441); and it must issue them in the prescribed form (*Hambro* v. *Hull & London Fire A. C.*, 1858, 3 H. & N. 789).

(3) The third case is rather anomalous. In order to give a wider protection than that afforded by single insurances, associations of ship-

owners were formed for the purpose of indemnifying each other for losses happening to their ships; but owing to the fact that until 1825 only an individual liability could be undertaken under a policy, except in the case of the Royal Exchange and London Assurance Companies, these associations could not undertake a joint liability, and consequently each member was only liable as if he had been a separate underwriter, namely, to the extent of his subscription or share. This characteristic, which was originally compulsory upon them, was preserved for the sake of advantage when the statutory monopoly of joint liability enjoyed by the two chartered companies was abolished; and until 1867 it was considered that they need not use the statutory policy or be incorporated. Thus where each member of a club was only liable for the sum which he had underwritten, and the policies were signed by all the members, each of whom, in proportion to the amount of shipping which he had in the club, paid a certain sum which formed the stock of the society, the policies were held good (*Harrison* v. *Miller*, 1796, 7 T. R. 340 *n.*); while where a company of shipowners engaged to insure each other's ships, covenanting severally and not jointly to pay a certain sum in case of loss in proportion to their respective shares, but in case of insolvency of any member, all the others were to be responsible, the policy was held invalid (*Lees* v. *Smith*, 1797, *ibid.* 338); and where the policy was in common form by an insurance club, by the rules of which members were not responsible for each other's solvency, it was held valid though the sums for which they undertook the risk were not specified on the face of the policy, but only the aggregate sum insured by them all (*Dowell* v. *Oliver*, 1815, 4 Camp. 166). Under the Companies Acts of 1862 onwards it was, however, held that such associations must be registered as companies if they consist of more than twenty persons, and they must comply with the requirements of the statutory policy (*In re Arthur Average Association*, 1875, L. R. 10 Ch. 542; *In re Padstow Total Loss Association*, 1882, 20 Ch. D. 137); and the actual sum insured by each member of a mutual club (unincorporated) must be set out in the policy. The liability under a mutual insurance policy is construed to be a several and not a joint one, unless there are clear words to show the contrary.

An attempt has been recently made to make the members of a mutual club (unincorporated, being less than twenty persons) jointly as well as severally liable, from the fact of their styling themselves a "syndicate reassured," and accepting policies for a lump sum in the name of their manager, with fractional proportions of that amount set opposite the names of the members; but as the policy was expressed in the common form and the assurers to bind himself, each for his own part, although it contained a special clause entitling the assured, "by way of security for the performance of the obligations of the subscribing underwriters and each and every of them," to the benefit by way of charge upon any policies of reinsurance effected by them, it was held that on the face of the policy the contract of the insurers was several and not joint, and they were only liable for the proportions standing opposite their respective names (*Tyser* v. *Shipowners' Syndicate* (*Reassured*), [1896] 1 Q. B. 135; *Leo S. S. Co.* v. *Cordery*, 1896, 1 Com. Cas. 379). Rigby, L.J., held that the special clause for security created a joint liability of all the subscribing members in respect of any policies of reinsurance under which they had received benefit, such a charge being quite distinct from their liability as insurers; but the rest of the Court did not agree with him.

In the case of mutual clubs, each member is at once insurer and assured: insurer in respect of losses of other members, and assured in respect of his

own (*Lion A. C.* v. *Tucker*, 1883, 12 Q. B. D. 187, Lord Esher, M. R.). The policies issued by mutual insurance clubs need not specify a premium, for each member is both assured and underwritter. The consideration for the contract is the mutual covenants or agreements for indemnity between himself and the other members (*ibid.*). The expense of the insurance is determined by the amount of contributions due from each member to the club for losses during the year, besides the expenses of the club (Arnould, 152); and the place of the premium is taken by a guarantee or some such arrangement (s. 84 (2) of the Bill). Companies for mutual insurance are usually limited by guarantee, say of £5, from each member to meet the costs, charges, and expenses of the company on being wound up, or to cover its debts and liabilities. The sums so specified are the only assets of the company, and the liability of each member of the association for the debts of the association is limited to that amount; but such a sum is not the limit of the member's individual liability for losses, which is only limited by the proportion due from him to reimburse the losses of the members of the association; and he can recover a full indemnity from the company for any loss of his, while it may sue him by its officers for his share of calls, claims, and contributions in full, irrespective of that limit (*Lion A. C.* v. *Tucker*, *ante*; *Marine M. I. A.* v. *Young*, 1880, 43 L. T. N. S. 441).

The statutory requirements of a policy, so far as they may be modified by the agreement of the parties, may be modified in the case of mutual insurance by the policies or rules and regulations of the association (s. 84 (3) of the Bill). The policies generally incorporate, actually or by reference, the regulations of the association (*Jamieson* v. *Newcastle S. F. I. A.*, [1895] 2 Q. B. 90; *Muirhead* v. *Forth & North Sea S. M. I. A.*, [1894] App. Cas. 72); and may contain a clause that any dispute thereon shall be settled by arbitration (*Edwards* v. *Aberayron Mutual Ship I. C.*, 1876, 1 Q. B. D. 563, 596, Brett, J.). The form of execution of the policy depends on the articles of association, but it must comply with the statutory requirements (see *post*), except as excepted above.

Mutual insurance policies are construed in the same way as Lloyd's policies, unless their wording requires a different construction. If a ship is insured by her manager in a mutual insurance club, although all her owners are not members of that club, they may by the terms of the policy become subject to the same liabilities as regards calls and contributions as if they were members, if such an insurance is within the scope of the managing owner's authority (*Great Britain* 100 *A*1 *S. I. A.* v. *Wyllie*, 1889, 22 Q. B. D. 710; *Ocean I. S. I. A.* v. *Leslie*, 1888, *ibid.* 723). But the wording of the policy may prevent its being available to any owner of a ship insured in a club who is not a member of it (*United Kingdom M. S. A. A.* v. *Nevill*, 1889, 19 Q. B. D. 110; *Montgomerie* v. *U. K. M. S. A. A.*, [1891] 1 Q. B. 370).

(4) Insurance may also be effected by agents for underwriters (the Bill defining "insurer" as including the agents of the insurer, s. 90), who are generally authorised to do so by power of attorney; or if no written authority to that effect is produced, may have such an authority presumed from evidence of their subscribing policies, which the underwriter has ratified by paying losses thereon (*Neal* v. *Irving*, 1793, 1 Esp. 61; 5 R. R. 720; *Haughton* v. *Ewbank*, 1814, 4 Camp. 88; *Brockelbank* v. *Sugrue*, 1831, 5 Car. & P. 21).

Where fifteen persons were empowered jointly or separately to sign policies on such ships as they should think proper, a policy executed in the name of the principal by four of the survivors was held good (*Guthrie* v.

Armstrong, 1822, 1 D. & R. 248); under a power of attorney to execute policies on which the risk should begin from the day when the ship should be accepted by the association, making a retrospective time policy (on 21st October), "lost or not lost," from the previous 29th February for a year, was held to be authorised, though when it was executed both the assured and the agent knew that two average losses had happened to the ship (*Mead* v. *Davison*, 1839, 3 Ad. & E. 303; and see *Mason* v. *Joseph*, 1804, 1 Smith, 406). An authority to subscribe a policy may imply authority to adjust it if the relationship between the underwriter and his agent warrant it, but not otherwise (*Richardson* v. *Anderson*, 1805, 1 Camp. 44 *n.*; 10 R. R. 628 *n.*; *Goodson* v. *Brooke*, 1815, 4 *ibid.* 163; Arnould, 192; Phillips, 1893 and 1894); and Lloyd's agents have no such authority given them in their printed instructions (*Read* v. *Bonham*, 1821, 3 B. & B. 147; 23 R. R. 587; *Drake* v. *Marryat*, 1823, 1 Barn. & Cress. 473; 25 R. R. 464).

VI. The Extent of Insurance.

(1) *Insurable Value.*—The limit of insurance on the thing insured is determined by the *insurable value*, which is the greatest value for the purposes of insurance that the thing insured can have, and consequently the maximum to which insurance can be made. This may be fixed by agreement between the assured and the insurer naming a certain sum as the value of the thing insured; and it is not necessary in such a case for the assured to prove what the extent or real value of his interest therein is, or more than that he has some interest in the thing insured; and the thing may be valued at any amount, provided that its real value is known to both parties.

(2) *Open Policies.*—If no sum is fixed by the policy as the value of the thing insured, the value is determined by the rule stated under the first head of this article, namely, its value as it was at the beginning of the risk, and not as it would have been if no risk had ever been undertaken; and the policy is called an open policy.

In the case of a ship the insurable value is her value at the beginning of the risk, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements, if any, incurred to make the ship fit for the voyage or period of time covered by the policy plus the charges of insurance upon the whole; and the term "ship" in the case of a steamship includes the machinery, boilers, and coals, and in the case of a ship engaged in a regular trade, the permanent fittings requisite for the trade (s. 15 (1) of the Bill; Arnould, 320).

In the case of freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured plus charges of insurance (s. 15 (2) of the Bill; *Forbes* v. *Aspinall*, 1811, 13 East, 323; 12 R. R. 352; *Palmer* v. *Blackburn*, 1822, Bing. 61; 25 R. R. 599).

In the case of goods the insurable value is the prime cost of the property insured plus the expenses of shipping and the charges of insurance upon the whole (s. 15 (3) of the Bill; *Usher* v. *Noble*, 1810, 12 East, 646; 11 R. R. 505). The prime cost is generally shown by the invoice price, but not always (Arnould, 321); and in the United States it has been held that the market price is the true standard, and not the prime cost or invoice price, if it exceeds or is less than the market price (Phillips, 1229). Where the invoice price is in foreign money, if there is a current rate of exchange at the foreign port of loading the insurable value of the goods is the invoice price taken at the rate of exchange there at the beginning of the risk, and not at the rate prevailing at the time of adjusting the loss (Arnould,

323; Phillips, 1231); and a contrary decision of Lord Kenyon is, it seems, wrong (*Thellusson* v. *Bewick*, 1793, 1 Esp. 77). If in such case there is no current rate of exchange at the foreign port where the goods are shipped, and their invoice is expressed in foreign currency, the insurable value is ascertained by calculating what the foreign coin in which it is expressed would be worth to the consignee of the goods after paying insurance and transport charges (Arnould, 322). Where goods are bought by barter in a foreign port, their insurable value is a subject of estimate in the precious metals at the place and time in question, adding or deducting for the rate of exchange with the place where the policy is made (but if they are shipped in a port in which the rate of exchange cannot be estimated, according to the French Code the insurable interest is measured by the cost and charges of the goods given in barter, to which shall be added the expense of bringing them to the place of shipment and shipping them) (Phillips, 1230). Goods either of owner's own make or brought from distant places to the port of shipment where there is no regular sale for them, merely for the purpose of being forwarded thence, must be valued at the price they would have fetched at the place whence they came, and the expenses of being brought to the port of shipment (Crump, 215). Freight and other expenses to be incurred by goods during the risk are not a part of the insurable interest in them, nor is advanced freight without some express provision or implication to that effect (Phillips, 1233 and 1234; *Winter* v. *Haldimand*, 1831, 2 Barn. & Adol. 649). Where the goods are subject to a drawback on exportation, that drawback, it seems, cannot be deducted from their insurable value because it is no part of their market value at the port of shipment (so held in United States; Phillips, 1235; Arnould, 323).

By the terms of the policy the insurable value of goods may be a fluctuating one, *e.g.* a policy for a year for £12,000 on goods carried in thirty barges, in a case where it was proved that in the year each barge had carried goods to that amount, and the loss in respect of which claim was made was for £1700 worth of goods on board one barge which had sunk, and it was held that the insurable interest of the assured for the purpose of such loss was the amount of goods actually at risk at the time, and the underwriter must pay such a proportion of the insurance as £12,000 bore to the whole value of goods afloat at the time of loss (*Crowley* v. *Cohen*, 1832, 3 Barn. & Adol. 478; so in the United States, *Columbian I. C.* v. *Catlett*, 1827, 12 Wheaton, 383, Storey, J.). The loss is thus apportioned between the parties in the proportion which the sum insured bears to the amount of insurable interest on board at the time of loss. See *Floating Policies, post.*

In the case of any other subject or interest, the insurable value is the amount at the risk of the assured when the policy attaches, plus charges of insurance (s. 15 (4) of the Bill). Thus in the case of profits and commissions, the insurable value is the amount which would have been made as profit or commission on the sale of goods on their safe carriage, if a peril insured against had not happened, provided that the conditions of an insurable interest are complied with (see above). In the case of a reinsurance the amount of interest is the sum insured in the original policy, with the addition of the premiums of reinsurance, if the original risk be fully reinsured (Phillips, 1248); but of course only part of it may be covered (*Ass. Gen. of Trieste* v. *Roy. Ex. A. C.*, 1897, 13 T. L. R. 307). In bottomry and respondentia the amount of the lender's interest is the amount of the loan, adding the usual rate of interest and the premium of insurance; the amount of the borrower's interest is the excess of the value

of the property over the amount of the loan, including the rate of premium on the whole, or if the lender takes only a particular risk, the borrower has an insurable interest in the whole value as to other risks (Phillips, 1249). The bottomry bond is liable to be reformed by the Admiralty Court, and the amount of the insurable interest may be affected accord-

The amount at risk is not diminished by the wear and tear of the thing insured, or by expense of repair in the case of a ship, or by liens upon it (Phillips, 1265).

In every case the charges of insurance form part of the insurable interest, and thus the premium paid for insurance is to be added to it. Besides this premium, the premium payable to secure that premium may be added to the insurance, so that the assured may completely extinguish his risk, as well as the expenses of the policy, *i.e.* the stamp duty, and broker's commission if effected by a broker; and Arnould points out that thus in order to insure £1000, a policy for £1062 may be required, *e.g.* the premium of insurance £5, 5s. per cent.; the stamp duty, 6d.; and the broker's commission, ½ per cent. (Arnould, 319; Phillips, 1221). To this may be added, if desired, the charges of recovery in case of loss, by express stipulation. A stipulation to make a return of premium on a given contingency does not prevent the amount of the premium being included in the insurable interest.

(3) *Valued Policies.*—The parties may, however, agree that the value of the object insured shall be taken to be a fixed sum, or valuation; and the policy is then called a valued policy.

The object of a valuation is to fix an estimate on the subject insured, and to supersede the necessity of proving the actual value by specifying a certain sum as the amount of that value (Lord Ellenborough, *Forbes* v. *Aspinall*, 1811, 13 East, 323; 12 R. R. 382; *Usher* v. *Noble*, 1810, 12 East, 639; 11 R. R. 805; Lord Selborne, *Burnand* v. *Rodocanachi*, 1881, 7 App. Cas. 333), and it fixes the amount of insurable interest (Lawrence, J., *Shawe* v. *Felton*, 1801, 2 East, 209; 6 R. R. 394). The advantage which valued policies have over open or unvalued ones is that in a policy on goods valuation may be made with a view to profits, or the value of the goods at the port of delivery (Lord Ellenborough, above), *i.e.* counting in the cost of freight (*Thames and Mersey M. I. C.* v. *Pitts*, [1893] 1 Q. B. 476).

The scope of a valuation is *primâ facie* the full interest in the thing insurable, *e.g.* a valuation of a cargo is such of the whole cargo, and the valuation of freight is presumed to be that of the freight on the full cargo (*Forbes* v. *Aspinall*, above; Phillips, 1197, 1204). But this presumption may be displaced by showing that the assured had only a partial interest in the thing insured, in which case the valuation will apply to his proportion of interest only, *e.g.* under a policy on "goods" valued at £19,000 the assured, who only owned $\frac{4}{10}$ of the property, was held entitled to recover the whole, as intended for his interest (*Feise* v. *Aquilar*, 1811, 3 Taun. 506; 12 R. R. 695); and a policy on "freight valued at £2000" has been construed to apply to half the freight only, where the other half had been prepaid, so that the assured recovered a total loss on that half (*Allison* v. *Bristol M. I. C.*, 1876, 1 App. Cas. 209).

The valuation is conclusive for the purposes of the policy as between the insurer and assured, if there has been no fraud, and the conditions as to disclosure and representation have been complied with (s. 27 (3) of the Bill). The valuation is only conclusive between the parties to the same policy; and if the assured has effected more than one valued policy on the

same risk, the valuation in one policy does not limit what he can recover on the other (*Bousfield* v. *Barnes*, 1815, 4 Camp. 227; 16 R. R. 780); but what he recovers on one policy goes to reduce what he can recover on another (*Bruce* v. *Jones*, 1849, 1 H. & C. 769). If the valuation be the same in both policies, he cannot recover more than that sum (*Irving* v. *Richardson*, 1831, 1 Moo. & R. 153; *Morgan* v. *Price*, 1841, 4 Ex. Rep. 615). If, however, the risks are different although the interest is the same in two valued policies effected with the same underwriter, the assured can recover from his successive losses on the different risks up to the limit fixed in each policy, although the second loss was a total one happening before a partial loss on the first risk had been made good (*Lidgett* v. *Secretan*, 1871, L. R. 6 C. P. 616; *Woodside* v. *Globe I. C.*, [1895] 1 Q. B. 105).

This conclusiveness of the valuation cannot subrogate the underwriter to more extensive rights than those which the assured contemplated on making the policy (*North of England I. A. C.* v. *Armstrong*, 1870, L. R. 5 Q. B. 244; *Burnand* v. *Rodocanachi*, 1882, 7 App. Cas. 333); nor does it prevent its being examined to see what is the real subject of the valuation (see *ante*; *Williams* v. *North China I. C.*, 1876, 1 C. P. D. 757); and whether the whole of that subject has been at risk. Thus where freight was insured, valued at £6500, and at the time of loss the ship had only fifty-five bales on board or agreed to be put on board, the assured was only allowed to recover that proportion of the valuation insured which fifty-five bales were of the whole cargo (*Forbes* v. *Aspinall*, *ante*). So in the United States, where seventy-four mules were valued at 11,000 dollars, and the ship was lost with only thirty-five of them on board, the assured recoved only $\frac{35}{74}$ of the valuation (*Brook* v. *Louisiana I. C.*, 1826, 4 Martin N. S. (La.) 640).

The valuation is conclusive, whether the loss be total or partial (*Shawe* v. *Felton*, *ante*; *Lewis* v. *Rucker*, 1761, 2 Burr. 1167; see *Measure of Indemnity*, *post*); and it is immaterial whether the valuation exceeds, is equivalent to, or falls short of the real value (*Turner* v. *Edwards*, 1810, 12 East, 488; 11 R. R. 458; *Goldsmid* v. *Gillies*, 1813, 4 Taun. 803; 14 R. R. 671; *Thompson* v. *Reynolds*, 1857, 7 El. & Bl. 172; *Barker* v. *Janson*, 1868, L. R. 3 C. P. 303). A fraudulent valuation is not binding, and an exorbitant valuation, of which the exorbitancy is not disclosed to the underwriter, will avoid the policy (*Barker* v. *Janson*, *ante*; *Ionides* v. *Pender*, 1871, L. R. 9 Q. B. 531); and the valuation, unless the policy otherwise provides, is not conclusive for the purpose of determining whether there has been a constructive total loss (see *post*), *e.g.* a ship valued at £17,000, which suffered damage which it was estimated would cost £10,000 to repair, and her repaired value would have been £9000, is a constructive total loss (see *post*; *Irving* v. *Manning*, 1847, 1 H. L. 409); and the law is the same in the United States (Phillips, 1538). In the absence of fraud or non-disclosure, the assured need not prove the value of his interest, but only that he had some interest in the thing at risk (*Feise* v. *Aquilar*, *ante*; Arnould, 302).

VII. Double Insurance.

Where two or more policies are effected by or on behalf of the assured on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed (namely, the insurable value or the valuation), the assured is said to be over insured by double insurance (s. 32 of the Bill). As already explained above, there is an insurable interest for double insurance to any extent, *i.e.* the assured may insure the subject of insurance with as many underwriters and in as many policies as he likes, but he cannot recover, altogether, more than the insurable value if the policy be an open one,

or than the highest valuation if the policy be a valued one. The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not allowed to recover any sum in excess of the indemnity above mentioned (s. 32 (2) of the Bill); and where several policies are made as above, they are treated as making but one policy (Lord Mansfield, *Newby* v. *Reid*, 1763, 1 Black. W. 416). The older insurance law in England apparently corresponded with the present French law, by which only the underwriter on the first policy is liable for his full subscription, and those on subsequent policies are only liable for the balance of the loss (*The African Co.* v. *Bull*, 1690, 1 Show. 132).

Where the policy under which the assured claims is a valued policy, the assured must give credit in reduction of the valuation for any sum received by him under any other policy, without regard to the actual value of the thing insured (s. 32 (2) (*b*) of the Bill; *Bruce* v. *Jones*, 1849, 1 H. & C. 769). Where the policy under which he claims is an unvalued one, he must give credit as against the full insurable value of the thing insured (*ibid.* (*c*)). Where the assured receives any sum in excess of the indemnity to which he is entitled, he holds such sum in trust for the insurers according to their right of contribution among themselves (*ibid.* (*d*); so *Irving* v. *Richardson*, *ante*). The insurers on the different policies are thus guarantors for each other; and any insurer who pays the whole loss is entitled to a *pro ratâ* contribution from the others in the proportion which their subscriptions bear to the insurable value or valuation; *e.g.* where a merchant, who had an insurable interest in goods to the value of £2200, insured them first in Liverpool for £1700, and then in London for £2200, and recovered in full on the latter policy, the London underwriters were held entitled to recover a rateable amount of contribution from the Liverpool underwriters (*Rogers* v. *Davis*, *Davis* v. *Gildart*, 1777, Marsh. 140). The United States law is the same, but is generally varied by contract (Phillips, 361).

VIII. Preliminaries of the Contract.

A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party (s. 16 of the Bill). Thus if an underwriter subscribes a policy knowing that the ship has arrived safe (which the assured does not know), the policy is void and the premium may be recovered back (*Carter* v. *Boehm*, 1766, 3 Burr. 1906); while if the assured who knows of a loss having taken place, effects insurance through an agent who is ignorant of it, this concealment vitiates the policy (Arnould, 559). In the negotiations for a policy it is accordingly necessary to disclose fully and to state truthfully every fact which is material to such policy, and any concealment or misrepresentation is fatal to the policy.

(1) *Disclosure.*—The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to himself, and he is deemed to know every circumstance which in the ordinary course of business ought to be known by or to have been communicated to him; and if the assured fails to make such disclosure, the insurer may avoid the contract (s. 17 (1) of the Bill). The contract is deemed to be concluded when the "slip" is initialled (see *post*); and no fresh fact coming to the knowledge of the assured after that need be disclosed to the insurer (*Cory* v. *Paton*, 1872, L. R. 7 Q. B. 304; *Lishman* v. *Northern M. I. C.*, 1873, L. R. 8 C. P. 216). The knowledge of certain agents of the assured is for this purpose equivalent to his own knowledge; and thus a policy will be made invalid by the

concealment of a material fact by the captain of a ship intended to be insured, *e.g.* a previous loss (*Gladstone* v. *King*, 1813, 1 M. & S. 35; 14 R. R. 392; *Stribley* v. *Imperial M. I. C.*, 1876, 1 Q. B. D. 507; *Blackburn, Low, & Co.* v. *Vigors*, 1887, 12 App. Cas. 531); or by the agent for the ship at a foreign port (*Fitzherbert* v. *Mather*, 1785, 1 T. R. 12; 1 R. R. 134; *Proudfoot* v. *Montefiore*, 1867, L. R. 2 Q. B. 511). But the assured is not liable for concealments by any other agents except those concerned with the subject of the insurance or employed to effect the insurance (see *post*; *Blackburn, Low, & Co.* v. *Vigors, ante*). And if the agency of such agent has ended at the time when he learns the material fact, his knowledge does not bind his principal (so held in United States, *Ruggles* v. *Gen. Int. I. C.*, 1827, 4 Moo. C. C. 74; approved on this ground by Lord Halsbury in *Blackburn's* case, *ubi supra*, at p. 538).

Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk (s. 17 (2) of the Bill). The test of materiality is not the actual effect which the knowledge of the circumstance has upon the risk, but the effect which it may reasonably be expected to have upon the judgment of the underwriter in relation thereto, and a fact may be material which does not bear on the risk professed at all (*ibid.*) (*Rivaz* v. *Gerussi*, 1880, 6 Q. B. D. 222); thus it is immaterial that the intelligence not disclosed turns out to be untrue, or that the loss happens from a cause quite unconnected with the fact concealed (*Lynch* v. *Hamilton*, 1810, 3 Taun. 37; *Seaman* v. *Fonnereau*, 1743, 2 Str. 1183; 12 R. R. 591); or that the circumstance was once known to the underwriter, if it is not present to his mind when he executes the policy (*Bates* v. *Hewitt*, 1867, L. R. 2 Q. B. 595); or that the concealment was due to fraud or mistake (*Shirley* v. *Wilkinson*, 1782, 1 Doug. 306).

The following may be material circumstances to be disclosed: the time of the ship's sailing or last being heard of (*Webster* v. *Foster*, 1795, 1 Esp. 406; *M'Andrew* v. *Bell*, *ibid.* 373; *Willes* v. *Glover*, 1804, 1 Bos. & Pul. N. R. 14; 8 R. R. 739; and other cases given at Arnould, 562–570); any facts which aggravate the risk, *e.g.* which in time of war affect the national character of the subject insured and expose it to capture or detention, and which are peculiarly in the knowledge of the insured (*Campbell* v. *Innes*, 1821, 4 Barn. & Ald. 423; 23 R. R. 328; *Bates* v. *Hewitt*, 1867, L. R. 2 Q. B. 295); rumours of the capture or shipwreck of the vessel (*Da Costa* v. *Scandret*, 1723, 2 P. Wms. 170; *Nicholson* v. *Power*, 1869, 20 L. T. N. S. 580), or danger of capture from foreign warships (*Durrell* v. *Bederley*, 1816, Holt, 283; 17 R. R. 639; *Beckthwaite* v. *Nalgrove*, *ibid.* 388), although such rumours prove false, if they might influence the underwriter's judgment (*Haigh* v. *Adams*, 1871, 25 L. T. N. S. 566), and even though they are vague and of uncertain origin, it is safer to disclose them (*Morrison* v. *Univ. M. I. C.*, 1873, L. R. 8 Ex. 197); the course of the voyage (*Laing* v. *Union M. I. C.*, 1895, 1 Com. Cas. 11); the nature of the cargo, if a dangerous one (*Foley* v. *Tabor*, 1861, 2 F. & F. 663), though not its condition, see *post* (*Boyd* v. *Dubois*, 1811, 3 Camp. 133; *Brit. & For. M. I. C.* v. *Sturge*, 1897, 2 Com. Cas. 244); an excessive valuation of the cargo (*Ionides* v. *Pender*, 1874, L. R. 9 Q. B. 531); the port of loading (*Hodgson* v. *Richardson*, 1764, 1 W. Bl. 463; *Harrower* v. *Hutchinson*, 1870, L. R. 5 Q. B. 584); the employment of a ship in a dangerous service, *e.g.* smuggling, or serious damage to her, or loss of an anchor and chain (*Russell* v. *Thornton*, 1860, 6 H. & N 140; *Stribley's* case, *ante*; Arnould, 578); or the existence of a contract with a third party responsible for the

safety of the goods that he shall not be liable for anything except negligence, in which case the underwriter would have asked a higher premium (*Tate* v. *Hyslop*, 1855, 15 Q. B. D. 368).

The following circumstances, in the absence of inquiry (see *post*), need not be disclosed:—(1) Any circumstance which diminishes the risk (Lord Mansfield, *Carter* v. *Boehm*, 1766, 3 Burr. 1909); (2) any circumstance which is known or presumed to be known to the insurer, *i.e.* matters of common notoriety or knowledge, and matters known by an insurer in the ordinary course of his business, such as the general usages of particular trades (*Noble* v. *Kennoway*, 1780, 2 Doug. 510, "banking" in Newfoundland, or fishing on the Banks, between out and home passages; *Vallance* v. *Dewar*, 1808, 1 Camp. 503; 10 R. R. 738, *ibid.*; *Kingston* v. *Knibbs*, 1809, *ibid.* 508; 10 R. R. 772 *n.*, Oporto trade; *Salvador* v. *Hopkins*, 1765, 3 Burr. 1707, East India trade; *Planché* v. *Fletcher*, 1779, 1 Doug. 251, English and French trade; *Tennant* v. *Henderson*, 1813, 1 Dowl. P. C. 324; *Moxon* v. *Atkins*, 1812, 3 Camp. 200; 13 R. R. 789; *Stewart* v. *Bell*, 1821, 5 Barn. & Ald. 238; 24 R. R. 342, usage to tranship; *Da Costa* v. *Edmunds*, 1815, 4 Camp. 42; 16 R. R. 763, usage to carry deck cargo); or general and established restrictions on trade under revenue laws of different States or international law (*Lever* v. *Fletcher*, 1780, Par. 360; *Baker* v. *Blakes*, 1808, 9 East, 285; 9 R. R. 558; so in United States, Phillips, 628 and 446). It was at one time thought that it was unnecessary to disclose to an underwriter information about the proposed subject of insurance which was published in Lloyd's List or any shipping paper (*Foley* v. *Tabor*, 1861, 2 F. & F. 662); but it is now settled that, though the Shipping List at Lloyd's may be admissible in evidence against a Lloyd's underwriter, it is not conclusive of his knowing any fact stated therein; and if the assured makes a false statement or concealment, and then contends that the underwriter did not rely on that statement, he must prove that the latter did actually consult Lloyd's List, or the misstatement or concealment will avoid the policy (*Mackintosh* v. *Marshall*, 1843, 11 Mee. & W. 116; *Nicholson* v. *Power*, 1869, 20 L. T. N. S. 580; *Morrison* v. *Univ. M. I. C.*, 1872, L. R. 8 Ex. 40 and 197). On the same principle, general maritime intelligence in public newspapers need not be disclosed by the assured unless the assured has peculiar and private knowledge by which he can infer with more certainty than the rest of the public that they are facts material to the risk (Arnould, 584; *Nicholson* v. *Power*, *ante*). The assured is not obliged to make extraordinary exertions to find out news about an absent ship (Phillips, 612; *Wake* v. *Atty*, 1812, 4 Taun. 493; 13 R. R. 660; *Greenwell* v. *Nicholson*, 1837, 1 Jur. 285); though it is the duty of either party to use reasonable diligence in communicating material facts to the other before the contract is complete (Arnould, 591; Phillips, 561). (3) Any circumstance as to which information is waived by the insurer (*Beckwith* v. *Sydebotham*, 1807, 1 Camp. 116; 10 R. R. 652; *Freeland* v. *Glover*, 1806, 7 East, 457; 9 R. R. 803)—*e.g.* by his underwriting a policy not in accordance with the slip (see *post*), in regard to which the assured's not disclosing that the (cotton) cargo was damaged when shipped might have been a material concealment (*Brit. & For. M. I. C.* v. *Sturge*, 1897, 2 Com. Cas. 244). (4) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty (see *Warranties*, *post*).

Whether a particular circumstance not disclosed is material or not is a question of fact, and "circumstance" includes any communication or information made or given to the assured (s. 17 of the Bill). The assured must also in answer to inquiry disclose anything he knows, whether it be

material or not, for the fact of the inquiry makes it material (*Hayward* v. *Rogers*, 1804, 4 East, 590; 7 R. R. 638; *Gandy* v. *Adelaide M. I. C.*, 1871, L. R. 6 Q. B. 746).

Where concealment is set up by either party, the burden is on them to prove that the concealed fact was or should have been known to the other party before the slip was initialled, and that it was material (*Ionides* v. *Pender*, 1873, L. R. 9 Q. B. 531, Blackburn, J.). Either party may if he wishes waive his right (if circumstances give it him) to avoid the contract, and may elect and go on with it; and he may keep the question open so long as he does nothing to affirm the contract, or until a third party acquires rights under the contract, but lapse of time is evidence of his electing to affirm the contract (*Morison* v. *Universal M. I. C.*, 1872, L. R. 8 Ex. 40 and 197; s. 86 of the Bill).

Where the insurance is effected for the assured by an agent (broker), the broker must (in the same way and cases as his principal) disclose to the insurer (1) every material circumstance which is known to himself, or should be known by him in the ordinary course of business (s. 18 (1) of the Bill). Concealment by an agent for effecting a policy has the same effect on the policy as concealment by the principal (Phillips, 562); but this obligation is only binding on him while he is actually employed in effecting the insurance for the assured, and if he acquires information with regard to the subject of insurance after his connection with his principal has ceased (and that principal obtains an insurance through other agents), he need not disclose it to his principal, and the policy will be good (*Blackburn* v. *Vigors*, 1887, 12 App. Cas. 531). If, however, his agency is still continuing when he becomes aware of the facts which are material to disclose, a policy effected by other agents brought into connection with the assured by the original agent will be bad (*Blackburn* v. *Haslam*, 1888, 21 Q. B. D. 144). (2) He must disclose every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent (s. 18 (2) of the Bill). Thus a policy is good which is effected by an agent in ignorance of any loss for a principal who knows of it, but not in time to communicate it to him before the contract is made (Arnould, 559).

(2) *Representations.*—Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true; if it be untrue, the insurer may avoid the contract (s. 19 (1) of the Bill); and a representation includes every answer given by the assured or his agent to any question asked by the insurer touching the insurance ((5) *ibid.*). A representation is not part of the contract, and is never therefore introduced into it; thus a paper containing a written statement, even though wrapped up with the policy or wafered to it at the time of subscription, is only a representation (not a warranty, see *post*) (*Pawson* v. *Barnevelt*, 1779, 1 Doug. 11). It may be either written or verbal, *e.g.* statements by broker to the insurer or instructions from the assured shown to the insurer; and is generally entered by the broker in his book (*Pawson* v. *Watson*, 1778, 2 Cowp. 785; Arnould, 515). Though a representation can never appear on the face of the policy, it may be implied from the language of the policy (*Hodgson* v. *Richardson*, 1764, 1 Black. W. 463, policy "at and from Genoa to Dublin, the adventure to begin from the loading to equip for the voyage," was held to imply a representation that ship would be loaded at Genoa; *Reid* v. *Harvey*, 1816, 4 Dow, 97; 16 R. R. 38, policy "to return 5 per cent. for convoy and arrival," held to imply a representation that ship would sail with convoy).

A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (s. 19 (2) of the Bill). A representation which is not material need not be true, unless it be fraudulent; but fraud will make it material, for "a representation if not material can hardly ever be fraudulent" (Lord Mansfield, *Pawson* v. *Watson, ante*). The materiality of a representation is not affected by the actual result of the adventure insured, for the loss need not have any connection with the fact misrepresented (*Lynch* v. *Hamilton*, 1810, 3 Taun. 36; 12 R. R. 591; *Ibid.* v. *Durnsford*, 1811, 14 East, 494; 13 R. R. 295). Whether a representation be material or not is a question of fact (s. 19 (6) of the Bill), and depends on the effect which it may reasonably be supposed to have on the mind of the underwriter. Certain representations, however, bear so plainly on the risk that they are presumed to be material, *e.g.* that a ship has sailed or will sail or was last seen in safety on a particular day (*Anderson* v. *Thornton*, 1853, 8 Ex. Rep. 425; *Dennistoun* v. *Lillie*, 1821, 3 Bli. P. C. 202; 22 R. R. 13; *Arnott* v. *Stewart*, 1817, 5 Dow, 274; 16 R. R. 123; *McDowall* v. *Fraser*, 1799, 1 Doug. 260), or the kind of armament or number of men she will carry (*Pawson* v. *Watson, ante*), or the nature of the cargo she is to carry (*Flinn* v. *Headlam*, 1829, 9 B. & L. 693); unless the assured can show conclusively that the underwriter was not in fact influenced by them (Arnould, 533). The only cases, however, in which the assured can prove this are where the representation is revoked, or where it is waived by the underwriter (Phillips, 681); and in no other case may evidence be given to show that a material misrepresentation did not actually affect the mind of the underwriter.

A representation may relate either to a matter of fact or to a matter of expectation or belief. In the former case it is true if it is substantially correct, whether literally so or not; in the latter case it is true if it is made in good faith (s. 19 (3) of the Bill). Formerly representations were divided into *affirmative* and *promissory*; but this is really only a difference in form, as both are really promises (see *Pawson* v. *Watson*, 1778, *ante*). It was also thought that a promissory representation if not fraudulent need not be true, though an affirmative one must be; but it is now established that in both forms truth is essential (*Dennistoun* v. *Lillie, ante*, Lord Eldon; *Edwards* v. *Footner*, 1808, 1 Camp. 530). A representation made with intent to deceive must, perhaps, correspond exactly with the facts, or the policy will be void (Arnould, 535). But at all events in the case of representations not fraudulently made relating to facts, a substantial compliance is sufficient (*De Hahn* v. *Hartley*, 1786, 1 T. R. 345; 1 R. R. 221, Lord Mansfield); thus a representation of "twelve guns and twenty men" is satisfied by nine carriage-guns and six swivels, sixteen men and eleven boys (*Pawson* v. *Watson, ante*); and a representation that "ship was last metalled in 1867" is satisfied by proof of her bottom having then been overhauled, and new metal put in where required (*Alexander* v. *Campbell*, 1872, 14 L. J. Ch. 478).

In the case of representations as to matters of belief or expectation, if they are made fraudulently (*i.e.* made to induce the assured to believe that which the assured knows to be false or does not know to be true), and they are untrue, they will make the policy void (*Evans* v. *Edmonds*, 1853, 13 C. B. 777); but if they are made *bonâ fide*, even though they are falsified by events, they do not invalidate the policy (*Barber* v. *Fletcher*, 1779, 1 Doug. 306, vessel "expected to leave coast of Africa in November or December" not leaving till May). A representation which, though positive in form, must be regarded as an expression of expectation or belief having

reference to the position of the parties and the circumstances of the case, will be so construed—*e.g.* a statement by a *goods* owner as to the time of a ship's sailing (*Bowden* v. *Vaughan*, 1808, 10 East, 415; 10 R. R. 240), or by a broker (*Hubbard* v. *Glover*, 1812, 3 Camp. 313; *Brine* v. *Featherstone*, 1813, 4 Taun. 867; 14 R. R. 689). But a statement may be positive in form and so regarded, because there is nothing in the circumstances to show that it was not so intended (*e.g.* a broker representing that a ship which he knew to have sailed from Sandy Hook on 6th December, and to have been seen in the Delaware five days after sailing from New York, "had been seen safe in the Delaware on 11th December," was held to avoid the policy (*McDowall* v. *Fraser*, 1799, 1 Doug. 260)). On the other hand, a broker's saying that "the vessel was American, but he was directed not to warrant anything," was held not to be a representation (*Christie* v. *Secretan*, 1799, 8 T. R. 192).

A representation may be withdrawn or revoked before the contract is concluded (s. 19 (4) of the Bill), either expressly or impliedly, *e.g.* assured making a statement which contradicts or qualifies a former one (*Dawson* v. *Atty*, 1806, 7 East, 366); or the underwriter may waive it by underwriting a policy inconsistent with it (*Bize* v. *Fletcher*, 1779, 1 Doug. 293). For the purpose of withdrawing a representation the contract is not concluded till the policy is executed (not as in concealment when the slip is signed) (*Fisher* v. *Liverpool F. and M. I. C.*, 1873, L. R. 8 Q. B. 469).

Representations are construed according to their plain meaning, viz. that in which they may reasonably be concluded to be understood by the underwriter, and they include all the natural and obvious inferences to be drawn from them by mercantile men, and generally refer to the time of their being made (Arnould, 538, 543; Phillips, 550, 565, and 567); *e.g.* a statement that "ship was on coast 2nd October," when the assured had heard on 21st February that the ship had left St. Thomas on the 2nd October, and the policy was not effected till 21st March, is a misrepresentation (*Ratcliffe* v. *Shoolbred*, 1780, Park, 290); a statement that "ship was all well at Elsinore on 26th July," when the owner knew that she had sailed thence on that day *before* the ship in which he had himself came from that port, and the policy was made immediately after his arrival, is a misrepresentation (*Kirby* v. *Smith*, 1818, 1 Barn & Ald. 672; 19 R. R. 412). In the United States a representation by the assured, who lived at New York, to Boston underwriters that his ship was "coppered" was held to mean coppered in the sense in which that word would have been understood at New York (*Hazard* v. *New England M. I. C.*, 1834, 8 Peters S. C. 557; Phillips, 566). If the language be designedly ambiguous, and the underwriter is deceived thereby, the fraud discharges him from the contract (Arnould, 539); but if it is obviously ambiguous without fraud, and the underwriter does not make inquiry or get an explanation from the assured, he will be bound by the meaning, whatever it is, and cannot say it is not true in the sense in which he understood it (*Freeland* v. *Glover*, 1806, 7 East, 462; 9 R. R. 803). If the words used in it are technical, or have a peculiar mercantile meaning, they are construed according to that meaning; *e.g.* "a ship to sail in the month of October" held a misrepresentation, although ship sailed on 11th October, for by usage of trade this meant between 25th October and 2nd November (*Chauraud* v. *Angerstein*, 1791, Pea. 43).

Evidence is not admissible to show that a representation was made in order to qualify the express terms of a written policy, nor to exclude a usage of trade inconsistent with it, the terms of which are not expressed in the policy, nor to override an implied warranty in the policy (Blackburn, J.,

Fawkes v. *Lamb*, 1862, 31 L. J. Q. B. 98; and *Burges* v. *Wickham*, 1863, 33 L. J. Q. B. 17, though in the latter case Cockburn, C.J., and Wightman, J., held that it would be admitted to ascertain the extent of an implied warranty of seaworthiness; and Blackburn, J., agreed with the rest of the Court on the ground that the implied warranty was satisfied without resorting to external evidence as to its extent). Arnould's editor agrees with Blackburn, J., but Arnould himself thought evidence of a representation could be given to exclude such a trade usage as that above described, and Phillips and Duer agree with him; and Phillips also favours its being allowed to exclude an implied warranty (Phillips, 594 and 602; Arnould, 541, 542).

A representation made to the first of several underwriters is considered to be made to all, as each is supposed to underwrite, partly relying on the presumption of the first having ascertained it to be a proper risk, subject to two conditions, viz.—(1) it must relate to intelligence material to the proposed insurance as stated in the slip, and not to matters of collateral agreement (Arnould, 545; *Stackpoole* v. *Simon*, 1779, Park, 648); (2) it must be such as to induce the underwriters to accept lower terms for the risk than they would have otherwise accepted, for it is "a communication to them all for their benefit, but not so as to charge them" (*Robertson* v. *Marjoribanks*, 1819, 2 Stark. 573; 20 R. R. 740). The rule is, however, not favoured: Lord Ellenborough expressed great doubts of its validity, and it is confined strictly to representations made to the first underwriter (*Forster* v. *Pigou*, 1813, 1 M. & S. 13; *Bell* v. *Carstairs*, 1810, 2 Camp. 543; 11 R. R. 793; *Brine* v. *Featherstone*, 1813, 4 Taun. 869; 14 R. R. 689). Where the first underwriter is a mere "decoy duck," *i.e.* subscribes the slip or policy on the understanding that it is not to be binding on him, and with the object of leading others to insure, this is a fraud on the subsequent underwriters and avoids the policy (*Wilson* v. *Ducket*, 1762, 3 Burr. 1361, Lord Mansfield commenting on earlier cases; *Sibbald* v. *Hill*, 1814, 2 Dow. P. C. 262; 14 R. R. 160).

The assured or his agent is not bound, even in reply to inquiry, to give his opinion to the insurer on any matter relating to the adventure, and it is sufficient if he honestly discloses to the insurer the sources of his information, leaving him to form his own judgment thereon (s. 20 of the Bill). The assured is not liable for the truth of the facts, but only for the truth with which he states the information he has received (Arnould, 530; Phillips, 575; *Bell* v. *Bell*, 1810, 2 Camp. 479; 11 R. R. 769).

(3) *Slip.*—A third preliminary to the making of the formal contract (*i.e.* the execution of the policy) is the making of the slip or covering note or other customary memorandum of the contract. The ordinary course of business is to the following effect. The broker, on receiving orders from his principal to effect an insurance, prepares a "slip" embodying the terms of the proposed policy. In the case of Lloyd's underwriters, such a slip is initialled by the different underwriters for the amounts for which they are willing to underwrite, and a policy is afterwards drawn up by the broker of the assured, and taken by him to the different underwriters for execution. In the case of insurance companies a separate slip is prepared for each company by the broker of the assured, and the policy is afterwards drawn up from the slip by the officers of the company, and kept by them till sent for by the assured or his broker (Arnould, 194). Slips are usually headed with the name of the broker, and may have printed clauses at the foot of them, which may be used or struck out as is required; *e.g.* "Docking clause:—F. G. A. and Y. and A. Rules. Risk to commence with

expiry of previous policy. Deviation and change of voyage clause. Warranted F. P. A. under 3 per cent. unless stranded, sunk, burnt, or on fire, or caused by collision." "The slip is in practice and according to the understanding of those engaged in marine assurance the complete and final contract between the parties fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed upon without a breach of faith, for which he would suffer severely in his credit and future business" (Blackburn, J. *Ionides* v. *Pacific F. and M. I. C.*, 1871, L. R. 6 Q. B. 674). "It is a contract of marine insurance, but cannot be enforced in law until it is embodied in a policy" (*Fisher* v. *Liverpool F. and M. I. C.*, 1873, L. R. 8 Q. B. 469). These decisions were given under the Stamp Act of 1867, and a slip was thus held to be a contract of marine insurance (though not a valid one, for only a policy was that), and admissible in evidence whenever it was material; and the Stamp Act of 1891 (see *post*) seems to reproduce the former law. The Marine Insurance Bill provides that a contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped; and where there is a duly stamped policy reference may be made as heretofore to the slip or covering note in any action for rectifying or avoiding the policy (ss. 21 and 89). For an example of the slip rectifying the policy, see *The Aikshaw* (1893, 9 T. L. R. 505), and of the effect of a covering note, *Bhugwandass* v. *Netherlands S. and F. I. C. of Batavia* (1888, 14 App. Cas. 83 P. C.).

IX. Form of the Contract.

(1) *Statutory and Common Law Requisites of the Contract.*—The instrument in which a contract of marine insurance, whether an insurance or reinsurance, is embodied is called a policy, and its form is determined by the Stamp Act, 1891, and the Insurance Act of 1787. By the former a contract for sea insurance (except those referred to in sec. 35 of M. S. A. 1862, now M. S. A. 1894, s. 506, viz. by a shipowner against his liability for damage done in a collision for which his ship is to blame) is not valid unless the same is expressed in a policy of sea insurance (s. 93 (1)), and no policy is admissible in evidence till it has been duly stamped (1891, Stamp Act, ss. 1, 2, 14, First Schedule; and so s. 22 of the Bill). A "policy of sea insurance" is defined as being any insurance (including reinsurance) made upon any ship or vessel or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit, which includes not only a sea risk but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance. Where any person in consideration of any sum of money paid or to be paid for additional freight or otherwise agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance (s. 92). The effect of this latter provision is that carriers, who by contract undertake the liabilities of insurers in addition to

those of carriers, are not liable under their insurance, unless it is embodied in a marine policy.

A policy of sea insurance is not valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months (Stamp Act, 1891, s. 93 (3)). The statute of 1787 (28 Geo. III. c. 56) also provides that no policy shall be effected without first inserting therein the name or names or the usual style and firm of dealing either (1) of one or more of the persons interested, or (2) of the consignor or consignees of the property to be insured, or (3) of the persons resident in Great Britain who shall receive the order for and effect the policy, or (4) of the person who shall give the order to the agent immediately employed to effect it. It has been held that general agents to whom a foreign principal had sent the bill of lading of goods, together with a bill of exchange drawn on them, could insure the goods in their own names as consignees, the original consignees having refused to accept the goods; that on a subsequent ratification by their principal they became "persons receiving the order to effect the policy," that their employment of the broker to effect it made them "persons giving the order to make the insurance," and that their acceptance and payment of the bill of exchange drawn on them on the security of the bill of lading made them "persons interested" (Buller, J., *Wolff* v. *Horncastle*, 1798, 1 Bos. & Pul. 316; 4 R. R. 808; and see *Bell* v. *Gibson*, 1798, *ibid.* 345; 4 R. R. 823; *De Vignier* v. *Swanson*, *ibid.* 346; 4 R. R. 825 *n.*; *Hibbert* v. *Martin*, 1808, 1 Camp. 538; *Hagedorn* v. *Oliverson*, 1814, 2 M. & S. 479; 15 R. R. 317). In practice the name usually inserted in the policy is that of the insurance broker, who insures in his own name and on his own account or in his own name and on account of his principals; and the statute is satisfied if the name of the person interested or his agent is inserted (Arnould, 108, 109, and 233).

Besides these statutory requisites, at common law the premium must also be specified in the policy, being the consideration for the contract; the Stamp Act of 1795 specified it among the requisites of the policy, but that of 1867 omitted it, as the present one does, leaving it to be provided for at common law. The policy may also provide for a premium being arranged; if none such is arranged a reasonable premium is payable, and the same rule applies to an additional premium arranged to be payable in a given event and not so arranged (s. 31 of the Bill). As to premiums of mutual insurance policies, see above (*Who may be Insurers*).

A policy must be signed by or on behalf of the insurer, and in the case of a corporation the corporate seal may be enough, but the corporation may subscribe the policy in any other way allowed by the statute, charter, deed, or articles of association under which it is constituted (*Wright* v. *Ward*, 1871, 1 Asp. 25; Arnould, 157; s. 24 of the Bill). Where the insurance is made by private insurers (*e.g.* Lloyd's underwriters) each one underwrites the policy with his name, the sum which he intends to insure generally written in words at length, and the date; for each subscription constitutes a distinct contract with the assured (s. 24 (2) of the Bill; Marshall, 269; Arnould, 249). A partnership subscribes a policy in its own name, and need not set out the names of the partners (*Reid* v. *Allan*, 1849, 4 Ex. Rep. 326; *Dowdall* v. *Allan*, 1849, 19 L. J. Q. B. 41). Mutual insurance clubs or shipowners' associations may underwrite either by all their members subscribing, or by their manager or other officer doing so in their behalf, but the latter method is only allowed where they are registered as companies, unless the names of the members are all set out with their

subscriptions at the same time in the policy, and such registration is obligatory on them if they consist of more than twenty persons (*In re London Marine Association*, 1869, L. R. 4 Ch. App. 611; *In re Arthur Average Association*, 1875, L. R. 10 Ch. App. 542; *In re Padstow Total Loss Association*, 1882, 20 Ch. D. 137). See *Who may be Insurers*, above.

(2) *Voyage and Time Policies.*—Where the contract is to insure the subject-matter from one specified place to another the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy (s. 25 of the Bill). The voyage covered by a voyage policy is the prescribed course of navigation from the *terminus a quo* or starting-point, to the *terminus ad quem* or destination, deviation from which (see DEVIATION) avoids the policy. Both the termini of the voyage must be set out in the policy. The voyage may be outward or inward or outward and inward, or as it is called a "round voyage." In the case of a time policy the termini are the two extremes of time. Either voyage or time policies may be made retrospective in effect, by inserting the words "lost or not lost" (*q.v.*), and in the case of a time policy by also antedating the beginning of the risk. Any loss which happens to a ship within the time limits specified in the policy is covered, though its extent is not ascertained till after the time has expired (*Knight* v. *Faith*, 1850, 15 Q. B. 667). In mixed policies containing contemporaneous time and voyage limits, the latter are generally only mentioned in order to specify the kind of voyage intended, and may not mark the beginning of the risk (Phillips, 928; Arnould, 374), and the subject of insurance may be covered if a loss happens within the time specified, though the ship did not start from the *terminus a quo* (*Way* v. *Modigliani*, 1787, 2 T. R. 30; 1 R. R. 412; *Robertson* v. *French*, 1803, 4 East, 130; 7 R. R. 535); but the period of time may follow the voyage (*Gambles* v. *Ocean M. I. C.*, 1875, 1 Ex. D. 141). No policy made for time shall exceed twelve months (Stamp Act, 1891, s. 93 (2)). Under an identical provision in the former Act it was held that a warranty in a policy "held not insured (*i.e.* by anyone else) for more than £2700 after March 20," was held to be satisfied, although besides a previous policy for £2700 there was also an insurance for £500 in a mutual club, which expired on March 20, but which, by the rules of the club, was to be renewed on its expiration by the managers, unless they received ten days' notice to the contrary; because as the ship was lost before March 20 no new effective policy could have been made (*Lishman* v. *Northern M. I. C.*, 1873, L. R. 8 C. P. 216), and a similar warranty is not broken by the assured insuring beyond the limit named in the original policy, because some of the underwriters on that policy were insolvent and the assured only insured to cover that deficiency (*Gen. I. C. of Trieste* v. *Cory*, [1896] 2 Com. Cas. 48).

(3) *Stamp Provisions.*—The following provisions of the Stamp Act with regard to stamps and penalties in connection with policies must be noticed: —The stamp duty on a policy (1) where the premium or consideration does not exceed the rate of 2s. 6d. per £100 of the sum insured, is 1d.; (2) in any other case (*a*) for or upon any voyage for every £100 or portion thereof insured, it is 3d.; (*b*) for time, for every £100 or portion thereof insured, where the insurance is made for any time not exceeding six months, it is 3d., and where it is made for a time more than six and less than twelve months, it is 6d. (Schedule). A policy made for a voyage and also for time extending to thirty days after the ship has anchored at her

destination is chargeable with duty as a voyage and as a time policy (s. 94). A policy cannot be stamped at any time after it is signed or underwritten, except (1) in the case of a mutual insurance policy already stamped, when an additional stamp may be put on it if the policy has not been signed or underwritten to an amount exceeding the sum which the duty impressed thereon extends to cover; (2) in the case of a policy made or executed out of, but enforceable within, the United Kingdom, which may be stamped within ten days after it has been first received in the United Kingdom, on payment of the duty only; (3) in the case of a policy being produced in evidence, when it can be stamped and made available for that purpose on payment of £100 penalty (s. 95). For stamp purposes legal alterations may be made in policies after they have been underwritten, if they are made before notice of the determination of the risk originally insured, and provided that they do not prolong the time covered by the insurance beyond six months in the case of a policy made for less than six months, or beyond twelve months in the case of a policy made for more than six months; and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by such alterations (s. 96). Under identical language in a former statute, "notice of determination of risk" has been held to mean determination of risk by the loss or safe arrival of the thing insured or by the final end and conclusion of the voyage (Lord Ellenborough, *Kensington* v. *Inglis*, 1807, 8 East, 273, 291; 9 R. R. 438; Arnould, 268); and the words "the property of the same person" require one identical and continued subject of insurance, and do not apply to a case where the thing first insured is essentially different from the thing afterwards insured (Lord Ellenborough, *Hill* v. *Patten*, 1807, 8 East, 373 and 376; 9 R. R. 469). Waiver of an implied warranty is within the original stamp (*Weir* v. *Aberdein*, 1819, 2 Barn. & Ald. 320; 20 R. R. 450), and so are corrections of mistakes (Arnould, 270, quoting cases). An altered policy which prevents any rights or liabilities arising under it also destroys the original ones under it (*French* v. *Patten*, 1807, 1 Camp. 72; 9 R. R. 571). A penalty of £100 is imposed on anyone (*a*) becoming an assurer on, or entering into any contract for, or directly or indirectly receiving or contracting, or taking credit in account for any premium or consideration for, any sea insurance, or knowingly incurring any risk, or making himself liable to pay for any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a duly stamped policy of insurance; or (*b*) making or effecting, or knowingly procuring to be made or effected, any sea insurance, or directly or indirectly giving or paying or making himself liable to pay any premium or consideration for, or entering into any contract for, any sea insurance, unless the insurance is so expressed as above; or (*c*) fraudulently contriving or devising or being guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on sea policies; and the same penalty is imposed on any broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy on material not duly stamped; and he forfeits all claim to any charge for brokerage, commission, or agency, or any money expended by him with reference to the insurance, and any money paid to him for such charge is deemed to be paid without consideration, and remains the property of his employer. The same penalty is also imposed on any person making or issuing or causing to be made or issued any document purporting to be a copy of a sea policy when there is not in existence a duly stamped policy of which the said document is a copy, in addition to any other fine or penalty to which he is liable (s. 97).

(4) *Designation of the Subject of the Insurance and Interest in it.*—The subject-matter insured must be designated with reasonable certainty (s. 26 of the Bill). The term "ship" includes the hull materials and outfit, stores and provisions for the officers and crew, and, in the case of a ship engaged in a regular trade, the permanent fittings requisite for the trade; and also, in the case of a steamship, the machinery, boilers, and coals (Rule 16 of the Bill, embodying *Brough* v. *Whitmore*, 1791, 1 T. R. 206; 2 R. R. 361; *Hill* v. *Patten*, 1807, 3 East, 375; 9 R. R. 469; *Gale* v. *Laurie*, 1826, 5 B. & L. 156). The words "hull and machinery" in a policy do not cover coals, stores, or provisions (*Roddick* v. *Indemnity M. M. I. C.*, [1895] 2 Q. B. 380).

The term "goods" means merchandise, and does not include personal effects or provisions or stores for use on board, nor does it include deck cargo or living animals, which, in the absence of usage, must be insured specifically (Rule 18 of the Bill); thus it covers jewels, bullion, etc., not attached to the persons of passengers (*Brown* v. *Stapylton*, 1827, 4 Bing. 121), an emigrant's outfit of mechanical and agricultural implements (*Wilkinson* v. *Hyde*, 1857, 3 C. B. N. S. 36), dollars entered at the Custom House (*Thomas* v. *Roy. Ex. A. C.*, 1824, Manning's Digest N. P. 165), and mortgages on goods (*Glover* v. *Black*, 1763, 1 Black. W. 405); but not bills of exchange or bank notes (*Palmer* v. *Pratt*, 1814, 2 Bing. 192), personal effects (*Ross* v. *Thwaites*, 1775, Park. 26), deck cargo (*Blackett* v. *Roy. Ex. A. C.*, 1832, 2 L. J. 259), living animals (so held in United States, *Walcott* v. *Eagle I. C.*, 1827, 4 Pick. Mass. 434), profits or commissions *Lucena* v. *Craufurd*, 1806, 2 Bos. & P. N. R. 315; 6 R. R. 623). "Freight" covers profit derivable by a shipowner for carrying his own goods in his ship and freight payable by a third party, but not passage money, except by usage (*Denoon* v. *Home and Colonial A. C.*, 1872, L. R. 7 C. P. 341; Rule 17 of the Bill).

The ship must be correctly described, but a mistake in her name which does not mislead the underwriter does not avoid the policy if the description designates the subject with sufficient certainty, or suggests the means of doing so (Blackburn, J., *Ionides* v. *Pacific I. C.*, 1871, L. R. 6 Q. B. 674—"Socrates" instead of "Socrate"; so *Le Mesurier* v. *Vaughan*, 1805, 6 East, 382; 8 R. R. 500). Goods must also be described accurately if specifically insured (*De Symonds* v. *Shedden*, 1800, 2 Bos. & Pul. 153; *Hunter* v. *Prinsep*, 1806, Marsh. 255; 10 R. R. 328—hats described as "piece goods," held fatal). Profits expected from a cargo not yet shipped do not come under "profits," but require special words (*McSwiney* v. *Roy. Ex. A. C.*, 1850, 14 Q. B. 646).

The usual practice in all these cases is to adhere to the statutory policy (see *post*), and for the requisite particularity of the description to write in the body of the policy, at the foot or on the margin, a statement of the real nature of the subject-insurance, *e.g.* "on 100 bales of cotton," leaving the printed clauses unaltered; for words thus written into the policy control and limit the effect of the general clause to the particular kind of interest (Lord Ellenborough, *Robertson* v. *French*, 1803, 4 East, 140; 7 R. R. 535; Lord Penzance, *Dudgeon* v. *Pembroke*, 1877, 2 App. Cas. 284, 293; Arnould, 238).

The nature of the interest of the assured in the subject insured need not be specified in the policy unless it be of such a character as to materially affect the risk; but an insurance by a lender on bottomry or respondentia must specify his interest therein, and a reinsurance must specify that it is such (s. 26 (2) of the Bill, embodying *Mackenzie* v. *Whitworth*, 1875, 1 Ex. D. 36, 44). Thus a carrier may insure goods generally (*Crowley* v. *Cohen, ante*), a mortgagee may insure ship or goods generally (*Irving* v. *Richardson*, 1831, 1 Moo. & R. 153), and a part owner of a ship may insure

"freight" generally (*Rising* v. *Burnett*, 1798, Marsh. 570). A specific description of bottomry or respondentia interest must be true in point of law; and describing an invalid bond as if it were valid will not make the policy good (*Simonds* v. *Hodgson*, 1829, 6 Bing. 114). Reinsurance was illegal from 1746 to 1865, unless the insurer were insolvent or dead, and the policy expressed that it was a reinsurance; and in *Mackenzie* v. *Whitworth* (1875, 1 Ex. D. 36, 44) it was proved to be the invariable practice in reinsurance policies to disclose that they were such.

Where the policy designates the subject of insurance in general terms it is construed to apply to the interest intended to be covered (s. 26 (3) of the Bill); *e.g.* that of a mortgagee (*Irving* v. *Richardson*, *ante*), or a part owner of a ship (*Gardiner* v. *Croasdale*, 1759, 1 Black. W. 198); and a person who has only a special interest in goods may recover in respect of that interest on a general insurance (Park, J., *Palmer* v. *Pratt*, 1814, 2 Bing. 192); *e.g.* a consignee and part owner of goods can insure his interest under "goods" (*Carruthers* v. *Sheddon*, 1815, 6 Taun. 414). Usage will, however, determine in many cases whether a designation is sufficient or not; *e.g.* "goods" may so cover deck cargo (*Da Costa* v. *Edmunds*, 1825, 4 Camp. 142; 16 R. R. 763); if such usage be not in direct conflict with the words used, *e.g.* a custom at Lloyd's to consider the word "boat" in the Lloyd's policy as not covering a boat slung on the ship's quarter, has been held bad (*Blackett* v. *Roy. Ex. A. C.*, 1832, 2 C. & J. 244).

(5) *Floating Policy.*—A policy may describe the insurance in general terms, and leave the ship or ships or other particulars to be defined by subsequent declarations (s. 29 (1) of the Bill); and this is common in cases where the assured has ordered goods to be shipped, but does not know their description or amount or the ship by which they are to come, subject to the condition that he is to declare these particulars to the insurer as soon as he knows them, and before loss if possible, though he may declare the subject to which the policy is to apply after loss (*Harman* v. *Kingston*, 1811, 3 Camp. 150; 13 R. R. 775; *Gledstanes* v. *Roy. Ex. A. C.*, 1864, 34 L. J. Q. B. 30). This is called a floating policy, and its common form is "on goods by ship or ships hereafter to be declared and valued"; and it has been legal for a hundred years (*Henchman* v. *Offley*, 1783, 2 Black. H. 345 *n.*; 3 R. R. 408, 413; *Kewley* v. *Ryan*, 1794, *ibid.* 343; 3 R. R. 408; *Ionides* v. *Pacific I. C.*, 1871, L. R. 6 Q. B. 674). The subsequent declarations may be made by indorsement on the policy or in other customary manner. Unless the policy otherwise provides, they must be made in the order of despatch or shipment, and must comprise all consignments within the terms of the policy, and the value of the goods or other property must he honestly stated; but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith (*Stephens* v. *Australasian I. C.*, 1872, L. R. 8 C. P. 18; *Imperial M. I. C.* v. *Fire I. C. L.*, 1879, 4 C. P. D. 166; s. 29 (2) and (3) of the Bill). For instances of consignments within the terms of the policy, see *Hunter* v. *Leathley* (1830, 10 B. & L. 858); and of rectifying mistake or omission, *Robinson* v. *Touray* (1811, 3 Camp. 158; 13 R. R. 781), even after loss or arrival (see above). Where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject of that declaration (s. 29 (4) of the Bill; *Harman* v. *Kingston*, *ante*).

(6) *Continuing Policy.*—Another policy of the same kind is a "continuing" policy, which is intended to cover any interest which the assured may have at risk within a certain space of time, *e.g.* carriers insuring "on

goods on board thirty boats, as interest may appear hereafter," for twelve months (*Crowley* v. *Cohen*, 1832, 3 Barn. & Adol. 478). As already seen, the insurable interest in such a case is the amount which the assured has at risk at the time of loss; and the insurance may either indemnify him in the proportion of the insurance which the goods lost bear to all the goods actually at risk at the time (*Crowley* v. *Cohen*, above), or in full without referring to such proportion of the loss (*Joyce* v. *Kennard*, 1871, L. R. 7 Q. B. 78).

(7) *The Lloyd's Policy.*—The ordinary voyage policy is known as the Lloyd's Policy, and as such is sanctioned by statute; its form is as follows (the particular portions being named in the margin for convenience):—

BE IT KNOWN THAT,

As well in own Name, as for and in the Name and Names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all doth make assurance and cause . . . and them and every of them to be insured, lost or not lost at and from . . . upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture of and in the good ship or vessel called the , whereof is Master, under God, for this present voyage , or whosoever else shall go for Master in the said ship, or by whatsoever other name or names the same ship or the Master thereof is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said ship upon the said ship, etc. , and shall so continue and endure during her abode there upon the said ship, etc.; and further, until the said ship with all her Ordnance, Tackle, Apparel, etc., and Goods and Merchandises whatsoever shall be arrived at upon the said ship, etc. until she hath moored at anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this insurance. The said ship, etc., Goods and Merchandises, etc., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy are and shall be valued at.

S.G.

Subject of Insurance.

Beginning of Risk.

End of Risk.

Liberty to touch, etc.

Valuation Clause.

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, etc., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Assured, their Factors, Servants, or Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, etc., or any part thereof without Prejudice to this Insurance; to the charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no Acts of the Insurer or Insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. And it is agreed by us the Insurers that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street or in the Royal Exchange or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves each one for his own part, our Heirs, Executors, and Goods to the Assured, their Executors, Administrators, and Assigns for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of

Perils insured against.

Sue and Labour Clause.

Waiver Clause.

Premium.

IN WITNESS WHEREOF we the Assurers have subscribed our Names and Sums Assured in (London).

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general or the ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds Per Cent.; and all other Goods also the Ship and Freight are warranted free from Average under Three Pounds Per Cent., unless general or the ship be stranded.

Memorandum.

£ (figures) A. B. (words) day of A.D.
£ „ C. D. „ „ „
£ „ E. F. „ „ „

Signatures (known as "lines" or "names").

The form of this policy is certainly three hundred years old (with the exception of the stranding clause added in 1749, and the waiver clause which is of recent origin), and it has been sanctioned by statute in 1795 and 1867. Any clause may be added which is needed for the requirements of the particular case, such as the running down clause (*q.v.*); rules as to general average, such as the York Antwerp Rules (*q.v.*); or warranties (see *post*).

(8) *Alterations in Policy.*—As the policy is the only legal evidence of the terms of the contract, it cannot be materially altered, after it is completed, without the consent of all parties to it; but until it is underwritten, it can be altered by one or the other party, *e.g.* "goods valued at £500" was altered to £1000 by the assured, with the consent of an underwriter who had underwritten the policy, but before the rest of it was underwritten (*Robinson* v. *Tobin*, 1816, 1 Stark. 356); and after subscription a mistake may be corrected if it is clear that the policy, as it stands, does not express the meaning of both parties to it, but this requires very strong evidence (*Henkle* v. *Roy. Ex. A. C.*, 1749, 1 Ves. 317; *Spalding* v. *Crocker*, 1897, 2 Com. Cas. 189, 193). A mistake by the assured in declaring interest under a policy may be rectified without the consent of the underwriter (*Robinson* v. *Touray*, 1811, 3 Camp. 158; 13 R. R. 781). By consent of both parties, subject to the stamp law provisions (*ante*), any alterations may be made in the policy, if written and initialled by the underwriters; but they will only bind the underwriters who have thus acknowledged them (*Forshaw* v. *Chabert*, 1821, 3 B. & B. 158; 23 R. R. 596).

The general rule at common law is that any material alteration of the policy by the assured avoids the policy, except as against underwriters who have consented thereto in writing (Arnould, 264). The following have been held to be material alterations:—Change of destination (*Laird* v. *Robinson*, 1791, 4 Bro. P. C. 488); the insertion of a subject of insurance in a blank policy (*Langhorn* v. *Cologan*, 1812, 4 Taun. 330; 13 R. R. 613); alteration of time of sailing (*Fairlie* v. *Christie*, 1817, 7 Taun. 416; 18 R. R. 515); adding an alternative *terminus ad quem* (*Campbell* v. *Christie*, 2 Stark. 64); and inserting "a liberty to call off Jamaica" in a policy allowing "to touch, stay, etc., at any port whatsoever without prejudice" on a voyage from Cuba to Liverpool (*Forshaw* v. *Chabert, ante*). On the other hand, immaterial alterations will not vitiate the policy; if some underwriters only consent, they will be bound, and those who refuse will be liable under the old contract (*Saunderson* v. *M'Callum*, 1819, 4 J. B. Moore, 5); *e.g.* adding to the ship's name, "The Three Sisters," the words "Tres Hermanas" (*Clapham* v. *Cologan*, 1813, 3 Camp. 382); adding a liberty "to trade" to a policy which already contained a liberty "to proceed and sail to . . . sell, barter, and exchange, and load, unload, and reload at any port or place . . . the ship may call at" is immaterial (*Sanderson* v. *Symonds*, 1819, 1 B. & B. 426; 21 R. R. 675; Arnould, 261–266).

X. Warranties.

(1) *Generally.*—There are certain stipulations either expressly or impliedly in a marine policy undertaken by the assured, and known as warranties. They differ from *Representations* (*ante*) in being part of the policy, and requiring a literal fulfilment, whether material to the risk or not; and they cannot be controlled or excluded from the policy by representations (Arnould, 542; and see *ante*).

Warranties are generally promissory in form and effect, and amount to undertakings by the assured that some particular thing shall or shall not be done, or some condition shall be fulfilled, or by which he affirms or nega-

tives the existence of a particular state of things (s. 33 (1) of the Bill). They may be either express or implied (*ibid.* (2)); and are conditions precedent which the assured must fully and exactly comply with, whether they are material to the risk or not. If he fails to comply with them, the insurer may avoid the contract as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date (*ibid.* (3)); for instances of strict compliance being requisite, see *De Hahn* v. *Hartley*, 1786, 1 T. R. 345; 1 R. R. 221, Lord Mansfield and Ashurst, J.; *Newcastle F. I. C.* v. *Macmorran*, 1815, 3 Dowl. P. C. 255; 15 R. R. 67, Lord Eldon). The construction of the language of the warranty may be determined by usage if consistent therewith (Phillips, 766, quoting *Bean* v. *Stupart*, 1778, 1 Doug. 11; *Hyde* v. *Bruce*, 1783, 3 *ibid.* 213); but the plain meaning of the words used will be followed, and evidence cannot be given of a construction contrary to that meaning, though such construction has been put on it by persons who have adopted the same form of policy (*Prov. I. C. of Canada* v. *Leduc*, 1874, L. R. 6 P. C. 224).

Non-compliance with a warranty is excused when, by reason of unforeseen events, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by subsequent legislation (s. 34 (1) of the Bill); *e.g.* a warranty to sail with convoy in a policy made in war time becomes immaterial if peace ensues. No other cause will excuse a breach of warranty, *e.g.* a peril insured against in the policy will not (*Hore* v. *Whitmore*, 1778, 2 Cowp. 784; *Havelock* v. *Hancill*, 1789, 3 T. R. 277; 1 R. R. 703); nor will the fact that the loss is not in any way connected with the breach of warranty (*Hibbert* v. *Pigou*, 1783, 1 Marsh. 375, ship warranted to sail with convoy lost in a storm). Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied and the warranty complied with before loss (s. 34 (2) of the Bill; *De Hahn* v. *Hartley, ante*; *Quebec M. I. C.* v. *Commercial Bank of Canada*, 1870, *ante*); though if the underwriter waives a breach of warranty, or accepts notice of abandonment, he cannot then set up a breach of warranty as a ground for avoiding the policy (*Prov. I. C. of Canada* v. *Leduc*, above; *Weir* v. *Aberdein*, 1819, 2 Barn. & Ald. 320; 20 R. R. 450; *Quebec M. I. C.* v. *Commercial Bank of Canada*, 1870, L. R. 3 P. C. 234, 244).

(2) *Express Warranties.*—An express warranty may be in any form of words from which the intention to warrant is to be inferred (s. 35 (1) of the Bill). Words of description may constitute a warranty, *e.g.* "goods on board an American ship" (*Baring* v. *Clagett*, 1802, 3 Bos. & Pul. 201; 6 R. R. 759); but the language in which the description is given will not, *e.g.* "ship called *Tres Hermanas*" is not a warranty of the ship being Spanish (*Clapham* v. *Cologan*, 1813, 3 Camp. 382); nor does a policy on cargo "being 1031 hogsheads of wine" warrant that all the cargo is wine (*Muller* v. *Thompson*, 1813, 2 Camp. 610; 12 R. R. 753). An express warranty must be included in or written upon the policy, or in some document incorporated by reference into the policy (s. 35 (2) of the Bill), either in the margin or at the foot (*Kenyon* v. *Berthon*, 1779, 1 Doug. 12 *n.*); but merely being wafered to or wrapped up with the policy does not make it part of it (*Bean* v. *Stupart*, 1778, 1 Doug. 11; *Pawson* v. *Barnevelt*, 1779, *ibid.*). If a particular set of rules are referred to in the policy as governing it, they will be incorporated into it (*Pittegrew* v. *Pringle*, 1832, 3 Barn. & Adol. 514; *Graham* v. *Barras*, 1834, 5 *ibid.* 1011). An express warranty does not exclude an implied one, unless it be inconsistent therewith (s. 35 (3) of the Bill), *e.g.* an exception of "loss from rottenness, inherent defects,

and other unseaworthiness" in a voyage policy does not exclude the implied warranty of seaworthiness broken at starting, though remedied before loss (*Quebec M. I. C.* v. *Commercial Bank of Canada, ante*); nor does a description of a ship as "abandoned" and the policy being on her "salvage" (*Knill* v. *Hooper*, 1857, 2 H. & N. 277).

Express warranties may relate to anything which the parties choose; but perhaps the most common (now or formerly) are those of time of sailing or departing, being in port on a certain day, good safety, convoy in war time, lawful trade, or free of certain risks or risks in certain seas or ports, and neutrality (in war time).

"Sailing" "on" a certain day, or "on, before, or after a certain day" (*Hore* v. *Whitmore*, 1778, 2 Cowp. 784; *Vezian* v. *Grant*, 1779, Marsh. 359), is satisfied if the ship is unmoored and got under way in a state of complete readiness for the voyage on or before the day, with the purpose of proceeding to sea without delay, though she may afterwards be detained by some unforeseen delay (*Bond* v. *Nutt*, 1777, 2 Cowp. 601; *Thellusson* v. *Fergusson*, 1780, 1 Doug. 361; *Earle* v. *Harris, ibid.* 357; *Wright* v. *Shiffner*, 1809, 2 Camp. 247; 11 R. R. 263; *Sea I. C.* v. *Blogg*, [1898] 1 Q. B. 27); if she is not so completely ready, the warranty is not satisfied (*Ridsdale* v. *Newnham*, 1814, 4 Camp. 111; 16 R. R. 327; *Pittegrew* v. *Pringle*, 1832; *Graham* v. *Barras*, 1834, 5 Barn. & Adol. 1011; *Nelson* v. *Salvador*, 1829, M. & M. 309). Where the voyage consists of several stages, the warranty is satisfied if the ship starts properly equipped for the first stage at the time specified, meaning to complete her equipment for the later stage afterwards (*Bouillon* v. *Lupton*, 1863, 33 L. J. C. P. 37, a river and sea voyage). A warranty to "sail from" or "depart" means that the ship must not only have begun her voyage, but must be actually clear of the port by the day fixed (*Moir* v. *Roy. Ex. A. C.*, 1814, 4 Camp. 84; 1815, 3 M. & S. 461; 16 R. R. 330; *Lang* v. *Anderdon*, 1824, 3 Barn. & Cress. 495; *Baines* v. *Holland*, 1855, 10 Ex. 802; Phillips, 777). "In port on a certain day" in a time policy is satisfied if the ship is in any port (*Kenyon* v. *Berthon*, 1779, 1 Doug. 12 *a*). If a ship is insured "for one month safe moored in Portsmouth harbour," moving her from one part of the harbour to another, if she is moored safely, is within the policy (*Clarke* v. *Westmore*, Selwyn N. P. 1008). In a voyage policy "at and from" a given port, the words mean the port where the voyage is to begin (*Colby* v. *Hunter*, 1827, M. & M. 81), and the limits of the port may be shown by the place where clearance is given (*Williams* v. *Marshall*, 1815, 6 Taun. 390; 18 R. R. 542, Gravesend in port of London).

A warranty of "safety" or "well" on a certain day is satisfied if the thing insured is safe at any time during that day, *e.g.* under a policy "on goods lost or not lost," warranted well 9th December 1784, the policy, though made at 3 p.m. that day after the ship had been lost at 8 a.m. that day, is good (*Blackhurst* v. *Cockell*, 1791, 3 T. R. 360; 1 R. R. 717; s. 38 of the Bill).

A warranty of "convoy" has been held to mean that the convoy must be the regular Government convoy; that the ship must sail from the appointed rendezvous, and is protected in going there; that the convoy must be for the whole voyage insured; that it must be under proper sailing instructions, received from the officer in command; and that the ship must sail with the convoy, and continue with it till the end of the voyage, unless separated by necessity (Arnould, 620, quoting decisions). Though the ship overtake the convoy before loss, yet the warranty is broken; but if she is driven back by stress of weather after starting with the convoy, she may sail again without waiting for the next (*Laing* v. *Glover*, 1813, 5 Taun. 49).

A warranty of "lawful trade" is satisfied if the trade on which the ship is sent by her owners is lawful, and does not prevent the assured from recovering for a loss due to the master barratrously employing the ship in the smuggling trade (*Havelock* v. *Hancill*, 1789, 3 T. R. 277; 1 R. R. 703; see BARRATRY IN MARINE INSURANCE).

Warranties to be free of certain risks are "free from capture and seizure in ship's port of discharge" (*Dalgleish* v. *Brooke*, 1812, 15 East, 295; 13 R. R. 476; and other cases, Arnould, 839–842), "free from capture in port or ports" (*Baring* v. *Vaux*, 1810, 2 Camp. 541; 11 R. R. 791; and other cases, *ibid.*), "free from confiscation by Government in ship's port of discharge" (*Levi* v. *Allnutt*, 1812, 15 East, 267; and see F. C. S. vol. v. p. 324).

Risks in certain seas may also be excluded, *e.g.* "no St. Lawrence between 1st October and 1st April" (*Birrell* v. *Dryer*, 1884, 9 App. Cas. 345; so *Prov. I. C. of Canada* v. *Leduc*, 1874, L. R. 6 P. C. 224), "no iron or ore or phosphate cargoes exceeding net register tonnage across Atlantic" (*Hart* v. *Standard M. I. C.*, 1889, 5 T. L. R. 229).

A warranty of neutrality has the following effect. Where a ship is expressly warranted neutral at the beginning of the risk, it is an implied term of the warranty that as far as the assured can control the matter she shall continue neutral during the risk (s. 36 (1) of the Bill). Thus if war breaks out after the beginning of the risk between the country of the assured and any other country but that of the insurer, the policy is good; but if the countries of the assured and underwriter go to war with each other, the policy is void (*Aubert* v. *Gray*, 1862, 3 B. & S. 163). For what is neutral conduct, see NEUTRALITY. It can only be said generally here that neutrality depends on domicile and not on birth, and *primâ facie* any person resident in a hostile country is not a neutral, and one resident in a neutral country is a neutral, and the burden of proof is on the party to the policy which disputes that presumption. Any ship belonging to a person domiciled in England, whether of foreign birth or not, or domiciled in a neutral country, whether belligerent, British, or neutral by birth, comes within the warranty. In order to continue neutral throughout the risk under an express warranty to that effect, a ship must be properly documented, *i.e.* must carry the necessary papers to establish her neutrality, viz. a passport, sea-brief, sea-letter, or pass, a certificate of her registry, her bill of sale, which is the title to her ownership, the ship's articles or muster-roll, the charter-party (if there is one), her log-book, and bill of health; she must not falsify or suppress her papers or use simulated papers, for if any loss occurs through breach of this condition the insurer can avoid the contract (s. 36 (1) and (2) of the Bill; Arnould, 627 and 628, quoting decisions); and she must also carry a neutral flag (Arnould, 626). She may, however, carry a belligerent-owned cargo if it is truly represented as such (Arnould, 146). Where goods or other moveables are expressly warranted neutral, they must be neutral-owned throughout the risk and properly documented (*i.e.* have the invoices, bills of lading, certificates of origin, etc., relating thereto), and must be shipped by a neutral ship to a neutral destination, and the ship must, so far as the assured can control the matter, continue neutral during the risk (s. 36 (3) of the Bill). Goods shipped in contemplation of war to a destination which would become hostile, are not within the warranty; and it makes no difference that the consignor and consignee have agreed that the goods shall be at the former's risk till delivered (*The Atlas* and *The Sally*, 1805 and 1795, 3 Rob. C. 399; Arnould, 625). The produce of a hostile country, though owned by a neutral owner of the soil, is not within the warranty; nor is it if contracted for by a neutral in contempla-

tion of war, unless actually delivered before war; but it is, if imported from a hostile country into a neutral country, and thence reshipped (Arnould, 625 and 626, quoting decisions).

The duty of a neutral ship is (1) not to resist the right of search by belligerent cruisers (*The Maria*, 1799, 1 Rob. C. 340); (2) not to violate blockade (Arnould, 713; Phillips, 826–844); (3) not to be employed in the service of the enemy, *e.g.* by carrying despatches from belligerent Governments to the forces at the seat of war (*The Atalanta*, 1808, 6 Rob. C. 440), but despatches from ambassadors of a belligerent Government in a neutral country to their Government are not within this rule, nor such ambassadors themselves (*The Caroline*, 1808, *ibid.* 461; *The Trent* case, 1861, Hall, 683); or by acting as a transport in a belligerent service, even though against the master's will or without his knowledge (*The Orozembo*, 1807, *ibid.* 430; *The Kowshing* case, 1894, L. J. 641); (4) not to carry contraband of war (see CONTRABAND OF WAR); (5) not to engage in the privileged colonial or coasting trade of a belligerent (*The Immanuel*, 1799, 2 Rob. C. 186, the rule of the war of 1756). A breach of any of these duties is accordingly a breach of the warranty of neutrality of the ship, and also of that of the cargo if (as may be in the case of contraband) there is a connection between the shipowner and the cargo, or a privity between him and the cargo-owner, but not otherwise.

A warranty of neutrality may also be shown to be broken by the sentence of a competent foreign Prize Court delivered in accordance with international law, expressly or impliedly condemning ship or goods for breach of neutrality; the particular ground of condemnation need not be stated in such sentence for it to have this effect; it is enough if it appears plainly on the face of the sentence that the facts which it finds are incompatible with the neutrality of the ship or goods (*Bolton* v. *Gladstone*, 1804, 5 East, 155; 7 R. R. 674, Lord Ellenborough; *Baring* v. *Roy. Ex. A. C.*, *ibid.* 99; 7 R. R. 657; *Dalgleish* v. *Hodgson*, 1831, 7 Bing. 504, Tindal, C.J.; *Hobbs* v. *Henning*, 1865, 34 L. J. C. P. 117; *Seymour* v. *London and Provincial M. I. C.*, 1872, 41 *ibid.* 193; and see FOREIGN JUDGMENTS).

(3) *Implied Warranties.*—These are conditions not expressed in the policy, but implied in it by law (Arnould, 648), presumed from the fact of making the insurance (Phillips, 686).

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk (s. 37 of the Bill), in policies on goods (*Dent* v. *Smith*, 1869, L. R. 4 Q. B. 414; *Dawson* v. *Atty*, 1806, 7 East, 367; *Carruthers* v. *Gray*, 1812, 3 Camp. 142; *Hobbs* v. *Henning*, *ante*); or on ships; but in the latter case, there is an implied condition that the ship shall have evidence of her national character ready to be produced if required, and under the Merchant Shipping Act, every ship clearing from a British port must before clearance declare her national character (1894, s. 68). This is especially necessary in time of war, for want of such evidence may expose her to capture and condemnation.

The old decisions are to the effect that a ship, the nationality of which is not expressly warranted, need not sail with such documents as evidence of her nationality on board as long as she has them at the time of seizure (*Bell* v. *Carstairs*, 1811, 14 East, 374; *Rich* v. *Parker*, 1798, 7 T. R. 705); and that a breach of this warranty is only fatal to the policy if it actually prevents the voyage taking place (*Christie* v. *Secretan*, 1800, 8 T. R. 192, Lawrence, J.); and these are followed by a recent decision (*Trinder* v. *N. Queensland I. C.*, 1897, 2 Com. Cas. 216, Kennedy, J.). But subject thereto the underwriter is discharged from liability if she is not properly provided

by her owner with evidence of her nationality. As under the warranty of neutrality, so under this warranty, the sentence of a foreign Court condemning the ship insured for want of proper documents required by international law or treaty, is held to establish a breach of warranty, if that sentence proceeded definitely on the ground of want of proper documents, and the documents were such as were properly required (*Price* v. *Bell*, 1801, 1 East, 663; *Bell* v. *Bromfield*, 1812, 15 East, 364; *Steel* v. *Lacy*, 1810, 3 Taun. 285; 12 R. R. 658); and a register has been held to be not such a document (*Le Cheminant* v. *Allnutt*, 1812, 4 Taun. 367; 13 R. R. 636).

The only implied warranties which require notice are those of seaworthiness and legality.

(*a*) *Seaworthiness.*—In a voyage policy there is an implied warranty that at the beginning of the voyage the ship shall be seaworthy for the purpose of the adventure insured (s. 39 (1) of the Bill); and this warranty, as already seen above, can only be excluded from the policy by express provision to that effect (*Christie* v. *Secretan*, *ante*, Lawrence, J.; *Wedderburn* v. *Bell*, 1807, 1 Camp. 1; 10 R. R. 615, Lord Ellenborough; *Quebec M. I. C.* v. *Com. Bank of Canada*, 1869, L. R. 3 P. C. 234, Lord Penzance), as in *Parfitt* v. *Thompson* (1844, 13 Mee. & W. 392). It is immaterial that the loss is not due to the breach of warranty (*Forshaw* v. *Chabert*, 1821, 3 B. & B. 158; 23 R. R. 596), or that the assured did not know of it (*Douglas* v. *Scougall*, 1816, 4 Dow, 276; 16 R. R. 69), or that he has just had the ship surveyed and fully repaired (*Lee* v. *Beach*, 1762, Park, 342, latent defect). This warranty is implied in policies on ships and goods alike (*Watson* v. *Clark*, 1813, 1 Dow, 344; 14 R. R. 73).

The warranty is satisfied "if the ship is seaworthy when she first sails on the voyage; she need not continue so throughout the voyage; and the underwriter is liable if she becomes unseaworthy twenty-four hours after sailing" (Lord Mansfield, *Eden* v. *Parkinson* and *Bermon* v. *Woodbridge*, 1781, 2 Doug. 732, 781), or if she becomes so one hour afterwards (Lord Eldon, *Watson* v. *Clark*, *ante*).

Where the policy attaches while the ship is in port she must also, at the beginning of the risk, be reasonably fit to encounter the ordinary perils of the port (s. 39 (1) of the Bill), *i.e.* be capable of being moved from one part of the port to another for the purpose of repair, and of being moved alongside its wharves or quays there in order to take in cargo (*Parmeter* v. *Cousins*, 1809, 2 Camp. 235; 11 R. R. 702; *Annen* v. *Woodman*, 1801, 3 Taun. 299; 12 R. R. 663). If she arrives at the port, where the policy is to attach, a mere wreck, the warranty is not complied with (*Shawe* v. *Felton*, 1801, 2 East, 109; 6 R. R. 394); but the warranty is satisfied if she is seaworthy for the purpose of the port, though not so for the purpose of her voyage (*Forbes* v. *Wilson*, 1800, and *Hibbert* v. *Martin*, 1801, 1 Camp. 538; *Parker* v. *Potts*, 1815, 3 Dow, 23; 15 R. R. 1).

Where the policy contemplates a voyage in different stages, during which the subject-matter insured will be exposed to different degrees or kinds of perils, or the ship will require different kinds of equipment, the ship must be seaworthy at the beginning of each stage, and it is sufficient if at the beginning of each stage she is seaworthy for the purpose of that stage (s. 39 (2) of the Bill; *Dixon* v. *Sadler*, 1839, 5 Mee. & W. 414; *Bouillon* v. *Lupton*, 1863, 33 L. J. C. P. 37, voyage at and from Lyons to Galatz, where a river-captain and crew were only required till Marseilles, and a sea-captain and crew were then taken for the sea voyage). The underwriters cannot set up a defence if the ship is lost on the first stage of the voyage, that she was not then seaworthy for the second, or *vice versâ* (*Biccard* v.

Shepherd, 1861, 14 Moo. P. C. 471; *Oliverson* v. *Loughman*, cited, 2 Barn. & Ald. 322; so in United States, Phillips, 720).

A ship is seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured (s. 39 (3) of the Bill), *i.e.* "fit as to repairs, equipment, and crew" (*Dixon* v. *Sadler*, *ante*, Parke, B.). "Seaworthiness varies according to the place, the voyage, the time of year, the nature of the cargo, and even the nature of the ship herself" (Brett, L.J., *Turnbull* v. *Janson*, 1877, 36 L. T. N. S. 635); and has thus a relative and not an absolute standard. A vessel built for river navigation and unfit generally for a sea voyage satisfies the warranty if she is made as fit for it as she reasonably can be (*Burges* v. *Wickham*, 1863, 3 B. & S. 669). Whether a ship is seaworthy within the warranty is a question of fact; but evidence is, it seems, not admissible to show what degree of seaworthiness is required in the particular case, if the underwriter is fully acquainted with the risk (*Clapham* v. *Langton*, 1864, 34 L. J. Q. B. 46). If a ship is described as a "steamer" only, evidence cannot be given to show that a less than ordinary condition of seaworthiness was required in the case of a vessel not of the ordinary kind for the voyage, though it can be given to show the kind of ship and the nature of the voyage (Blackburn, J., *Burges* v. *Wickham*, above).

The ship must be fit as regards (1) her hull, and this is shown by how she stands the voyage (*Parker* v. *Potts*, 1815, 3 Dow, 23; 15 R. R. 1; *Watt* v. *Morris*, 1813, 1 *ibid.* 32; *Douglas* v. *Scougall*, 1816, 4 *ibid.* 269; 16 R. R. 69, Lord Eldon): (2) her equipment, and the following deficiencies have been held to be fatal:—rotten light sails, though the ship sinks in a storm where they would have been useless (*Wedderburn* v. *Bell*, 1807, 1 Camp. 1; 10 R. R. 615); defective anchors (*Wilkie* v. *Geddes*, 1815, 3 Dow, 57; 15 R. R. 17); insufficient stores and repairs (*Stewart* v. *Wilson*, 1843, 12 Mec. & W. 11); want of proper medicines and necessaries (*Woolf* v. *Clagett*, 1800, 3 Esp. 258; 6 R. R. 830); in the United States, want of provisions and candles (*Fontaine* v. *Phœnix I. C.*, 1813, 10 Johns. N. Y., 58); a defective boiler (*Quebec M. I. C.* v. *Com. Bank of Canada*, *ante*). (3) She must be fit as regards her master, crew, and pilot; thus a ship is unseaworthy which has an incompetent master (*Tait* v. *Levi*, 1811, 14 East, 481; 13 R. R. 289), or too few officers (*Clifford* v. *Hunter*, 1827, Moo. & M. 103); and whose officers and engineers do not comply with the provisions of the Merchant Shipping Act as to certificates, etc. (M. S. A. 1894, ss. 92 ff.), to the knowledge of the shipowner; but if he is ignorant of it the underwriter's liability continues (*Farmer* v. *Legg*, 1797, 7 T. R. 186; so *Cunard* v. *Hyde*, 1858, 27 L. J. Q. B. 408). The master may be changed without the consent of the underwriters (as the Lloyd's policy shows), unless a particular master is held out as going with the ship (*The Morocco L. & T. C.* v. *Fry*, 1856, 11 L. T. N. S. 618). The crew must be adequate, both in numbers and skill, to perform the duties required of them (Lord Tenterden, *Shore* v. *Bentall*, 1828, 7 Barn. & Cress. 798; Lord Ellenborough, *Hunter* v. *Potts*, 1815, 4 Camp. 203; 16 R. R. 776); and it is generally requisite that a sufficient crew should be shipped for the whole voyage at the outset (except with a voyage of different stages), or the warranty will be broken (*Forshaw* v. *Chabert*, 1821, 3 B. & B. 158; 23 R. R. 596).

The warranty only extends to the beginning of the risk; and the underwriters take the risk of subsequent misconduct and negligence of the master and crew (*Busk* v. *Roy. Ex. A. C.*, 1818, 2 Barn. & Ald. 73; 20 R. R. 350, fire caused by negligence of mate; *Walker* v. *Maitland*, 1821, 5 Barn. & Ald. 171; 24 R. R. 320, sloop wrecked owing to its crew going to sleep; *Bishop* v.

Pentland, 1827, 7 Barn. & Cress. 219, ship stranded owing to being negligently fastened only by a weak rope; *Dixon* v. *Sadler*, 1839, 5 Mee. & W. 405, ship capsized by her ballast being improperly taken out of her).

Where the pilot's presence on board is required by statute, he is essential to the seaworthiness of the ship (*Law* v. *Hollingworth*, 1797, 7 T. R. 162), "if the effect of the statutory provision is to create an intermediate voyage on which the ship is not seaworthy without a pilot" (Patterson, J., *Hollingworth* v. *Brodrick*, 1837, 7 Ad. & E. 44); and it has been said he is so "whenever the ship comes out of a harbour, for the captain can always get one," though a master who takes his ship into a port himself without waiting to get a pilot, and does damage to her, does not break the warranty (*Phillips* v. *Headlam*, 1831, 2 Barn. & Ald. 380, Lord Tenterden); and he may be so, where usage so requires. But otherwise he is not, for his employment depends on the master, and the assured is not liable for negligence or misconduct of the master after the beginning of the risk (Tindal, C.J., *Dixon* v. *Sadler*, 1841, 8 Mee. & W. 895, 900).

(4) The ship must also be fit as regards her cargo, *i.e.* not overloaded (*Biccard* v. *Shepherd*, 1861, 14 Moo. P. C. 471; *Foley* v. *Tabor*, 1861, 2 F. & F. 662); but it makes no difference that the cargo is such as can be easily jettisoned (*Daniels* v. *Harris*, 1875, L. R. 10 C. P. 1). The cargo must not be badly stowed at the outset of the voyage, or the warranty will be broken, but bad stowage during the course of the voyage is not a breach of it (*Redman* v. *Wilson*, 1845, 14 Mee. & W. 476), and the ship must have proper ballast and be in proper trim at the beginning of the voyage, or she is unseaworthy (*Dixon* v. *Sadler*, *ante*).

The warranty of seaworthiness does not extend beyond the ship, *e.g.* to lighters used in loading or landing cargo, except by usage or express stipulation (*Lane* v. *Nixon*, 1866, L. R. 1 C. P. 412). A vessel may be seaworthy for the purposes of a policy on ship, though she may not be so for those of a policy on freight, *e.g.* where cargo has to be relanded owing to the defective state of the ship (Phillips, 723). Every ship is *primâ facie* seaworthy (Lord Eldon, *Parker* v. *Potts*, 1815, 3 Dow, 23; 15 R. R. 1), and the underwriter must prove that she is not so; but if soon after the policy attaches she sinks in smooth water in the harbour, or soon after she begins her voyage she becomes leaky or disabled or founders, or has to put into a port of distress, an inference arises which, though not a presumption of law shifting the burden of proof to the assured, yet justifies a direction to the jury that as a matter of reasoning they may presume that the ship was unseaworthy when she started (*Bruce S.S. Co.* v. *London Ass. Co.*, 1893, 9 T. L. R. 220, Lord Esher, and cases given in Arnould, 678). But if the loss happens a long time after she starts on her voyage, no such inference can be drawn (Arnould, 679); and the policy may also provide that the ship shall be admitted to be seaworthy (*Parfitt* v. *Thompson*, 1844, 13 Mee. & W. 392; *Phillips* v. *Nairne*, 1847, 4 C. B. 343).

In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where with the privity of the assured the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (s. 39 (4) of the Bill; *Dudgeon* v. *Pembroke*, 1877, 2 App. Cas. 284). The situation of the ship when such a policy attaches is immaterial; she may be in a foreign sea damaged and trying to make a port of distress (*Gibson* v. *Small*, 1853, 4 H. L. 353), or in a British port where the owner lives (*Thompson* v. *Hopper*, 1856, 6 El. & Bl. 187), or in a foreign port (*Fawcus* v. *Sarsfield*, 1856, 17 C. B. 551). If the ship goes to sea with the privity of her owners in an unseaworthy con-

dition, and loss is caused thereby, the assured cannot recover, for that loss is due to his own wrongful act (*Dudgeon* v. *Pembroke*, 1874, L. R. 9 Q. B. 581, Blackburn, J.); while if a ship assured by a time policy goes to sea in an unseaworthy condition, and her owner is ignorant of it, he can recover from the underwriter if the loss is caused by perils insured against (*ibid.*). If, however, in this latter case the loss is due to that unseaworthiness and not to perils insured against, the assured cannot recover from his underwriters, for the loss is caused by the vice of the thing insured (*Fawcus* v. *Sarsfield*, *ante*; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455).

In a policy on goods there is no implied warranty that the goods are seaworthy (s. 40 of the Bill; *Koebel* v. *Saunders*, 1864, 17 C. B. N. S. 71), though there is an implied warranty that the ship is seaworthy (*Oliver* v. *Cowley*, 1765, Park. 335); and so in United States (Phillips, 695).

(*b*) *Legality.*—Another warranty implied in all policies is that the adventure insured is a legal one, and that so far as the assured can control the matter the adventure shall be carried out in a lawful manner (s. 41 of the Bill). Where a voyage is illegal, an insurance upon it is illegal (Tindal, C.J., *Redmond* v. *Smith*, 1844, 7 Man. & G. 457).

An adventure is unlawful which is forbidden either (1) by the statute law of the country of the underwriter, *e.g.* the Customs Consolidation Act, 1876, or the Merchant Shipping Act, 1894, or treaties (certainly if enforced by statute) (*The Ecnroom*, 1799, 2 Rob. C. 1; *The Neutralitat*, 1801, 3 *ibid.* 295, England and Denmark; *Wilson* v. *Marryat*, 1798, 8 T. R. 31, and *Bird* v. *Appleton*, 1800, 8 T. R. 502; 5 R. R. 468, England and United States; *Walker* v. *Baird*, [1892] App. Cas. 491), or Orders in Council (*Waugh* v. *Morris*, 1873, L. R. 8 Q. B. 202), or an embargo (*Delmada* v. *Motteux*, 1785, Park. 357); but a mere breach of an Order in Council will not make a voyage illegal which is justified by its object (*Atkinson* v. *Abbott*, 1808, 1 Camp. 535, ship going to a port to which access was forbidden, in order to take provisions to the British forces there), nor will a breach of a provision of the Merchant Shipping Act, passed for a purpose collateral only with the trade and navigation of the country (*Redmond* v. *Smith*, *ante*, ship having no written agreement with her crew according to M. S. A.).

(2) An adventure is also illegal which is forbidden by the public policy of the insurer's country, *e.g.* insuring property of persons who are alien enemies against loss by British capture, either at the time of the insurance, or at the time when loss takes place (*Brandon* v. *Nesbitt*, *Bristow* v. *Towers*, 1794, 6 T. R. 25, 35; *Furtado* v. *Rogers*, 1802, 3 Bos. & Pul. 191; 6 R. R. 752; *Brandon* v. *Curling*, 1803, 4 East, 410; 7 R. R. 592; *Gamba* v. *Le Mesurier*, 1803, *ibid.* 407; 7 R. R. 590), though a British ship may be insured against British capture (*Lubbock* v. *Potts*, 1806, 7 East, 449), and only losses happening in peace time on policies which are effected in peace time can be recovered when peace is restored (*Flindt* v. *Waters*, 1812, 15 East, 260; 13 R. R. 457; *Harman* v. *Kingston*, 1811, 3 Camp. 150; 13 R. R. 775; *Boulton* v. *Dobree*, 1808, 2 *ibid.* 162). Insuring British-owned property engaged in trade with an enemy is also illegal for the same reason (*The Hoop*, 1799, 1 Rob. C. 196, Lord Stowell; *Potts* v. *Bell*, 1800, 8 T. R. 548; 5 R. R. 452), unless such trade is carried on under licence from the insurer's Government (*Hagedorn* v. *Bazett*, 1813, 2 M. & S. 100), provided that such licence be not used fraudulently (*Gordon* v. *Vaughan*, 1810, 12 East, 302; *Gibson* v. *Service*, 1814, 5 Taun. 433; 15 R. R. 541).

A breach of international law, *e.g.* of the laws of neutrality, will not avoid the policy, if the underwriters know, or may be presumed to know, the nature of the risk, *e.g.* a contract to carry contraband goods may be

insured if full disclosure be made to the underwriter (*Ex parte Chavasse, In re Grazebrook*, 1865, 34 L. J. Bky. 17; *Hobbs* v. *Henning*, 1865, 17 C. B. N. S. 791; *Ruys* v. *Roy. Ex. A. C.*, [1897] 2 Q. B. 135, arms shipped for Abyssinia during war between that country and Italy). Nor is the policy avoided by the adventure being illegal by the law of the country of the assured, if the underwriter is aware of the fact (*Planché* v. *Fletcher*, 1779, 1 Doug. 251; *Lever* v. *Fletcher*, 1780, Park. 360; *Aubert* v. *Gray*, 1861, 3 B. & S. 163, 169).

An adventure, however, which admits of a legal performance is *primâ facie* legal, or may be shown to be so (*Wright* v. *Welbie*, 1819, 1 Chit. 49; 22 R. R. 792); and an insurance to "any port in Domingo," where some ports were hostile and some neutral, was held, *primâ facie*, applicable to the latter (*Johnson* v. *Greaves*, 1810, 2 Taun. 344; *Muller* v. *Thompson*, 1809, 2 Camp. 610; 12 R. R. 753). The immediate and not the ultimate destination of the adventure decides its character, *e.g.* a policy on goods to a friendly or neutral port where they were to be delivered to a neutral who lived in a hostile country is good (*Bromley* v. *Heseltine*, 1807, 1 Camp. 75; 10 R. R. 635); and a policy on ammunition sent from one neutral port to another in order to be sent thence to a hostile port is legal (*Hobbs* v. *Henning*, *ante*). The illegality, to have effect, must take place on the actual voyage insured, *e.g.* if it happens at any time on an insured round voyage it will avoid the policy (*Wilson* v. *Marryat*, 1798, 8 T. R. 31); but if the out and home voyages are separately insured, or are distinct from each other, illegality on one voyage will not avoid the policy on the other, though the home cargo may be bought with the proceeds of the illegal outward cargo (*Bird* v. *Appleton*, 1800, 8 T. R. 562; 5 R. R. 468; *Sewell* v. *Roy. Ex. A. C.*, 1813, 4 Taun. 855). Where the voyage is legal, but illegal and legal goods are insured together in one policy, the policy is void (Phillips, 232; Arnould, 699), if all belongs to the same assured (*Parkin* v. *Dick*, 1809, 2 Camp. 221; 11 R. R. 258; *Camelo* v. *Britten*, 1820, 4 Barn. & Ald. 184); but if they are separately owned, though they are insured together by one agent, the policy will be good so far as the neutral goods are concerned (*Hagedorn* v. *Bazett*, 1813, 2 M. & S. 100); and where legal and illegal goods have been insured together belonging to the same assured, if some are within the protection of a licence from Government and the others are not, the policy has been held to be valid as to the former (*Keir* v. *Andrade*, 1816, 6 Taun. 498; 16 R. R. 660; *Pieschell* v. *Allnutt*, 1813, 4 Taun. 792; *Butler* v. *Allnutt*, 1816, 1 Stark 223).

Any illegality which will avoid the policy (see *ante*) allows the underwriter to avoid the policy, though he knew of its illegality before entering into it. See *Return of Premium, post.*

XI. Application of the Policy.

(1) *Beginning of the Risk.*—The application or protection of the policy begins with the attaching of the policy on the thing insured, or in other words the commencement of the risk. This depends on the wording of the policy; in time policies the two *termini* of the risk are the days on which the policy is expressed to begin and end. In voyage policies the risk on ship and goods may begin and end at different times in the same *terminus*; and its duration is generally determined by the provisions of the Lloyd's policy given above.

In all voyage policies on ship, freight, and goods, where the subject-matter is insured by a voyage policy "at and from," or "from" a particular place, it is not necessary that the ship should be at that place when the

contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced, the insurer may avoid the contract (s. 42 (1) of the Bill); while, where the subject-matter is insured "from" a particular port, the risk does not attach till the ship starts on the voyage insured (Rule 2 of the Bill). It is immaterial whether the ship's delay in reaching the port of departure or in leaving it is voluntary or involuntary, for either, if unreasonable, avoids the policy (*De Wolf* v. *Archangel M. B. & I. C.*, 1874, L. R. 9 Q. B. 451; *Mount* v. *Larkins*, 1831, 8 Bing. 108; *Hull* v. *Cooper*, 1811, 14 East, 479; 13 R. R. 287). If the ship is already in the port, but is not prepared to start, the condition of starting in a reasonable time equally applies, *e.g.* a policy on a yacht at and from Bristol to London made in January was held void by the vessel not sailing till May (*Palmer* v. *Marshall*, 1832, 8 Bing. 317; cp. per Lord Hardwicke, *Chitty* v. *Selwyn*, 1742, 2 Atk. 539). If the port in which the ship be lying is a foreign one, and she is not there for any particular voyage, the policy only attaches from the time when she begins to prepare for the voyage insured (Phillips, 935, quoting *Seamans* v. *Loring*, 1816, 1 Mas. C. C. 128). This implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or that he acquiesced in the delay (s. 42 (2) of the Bill; *Mount* v. *Larkins*, *ante*, Tindal, C.J.), *e.g.* by usage of trade, such as the Newfoundland trade practice of making intermediate voyages between the ship's arrival with her outward cargo and her departure with her homeward cargo (*Vallance* v. *Dewar*, 1808, 1 Camp. 503; 10 R. R. 738).

(*a*) *Ship.*—Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately; if she is not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival (rule 3 of the Bill). Unless the ship arrives in good safety, *i.e.* seaworthy for the purposes of the port, the risk under a policy "at and from" never attaches upon her (*Parmeter* v. *Cousins*, 1809, 2 Camp. 235; 11 R. R. 702, ship only kept afloat by pumping). By good safety is meant good physical safety, and not political safety (*Bell* v. *Bell*, 1810, 2 Camp. 475; 11 R. R. 769, Lord Ellenborough). By "arrival" at a port is meant "first arrival" (Lord Hardwicke, *Motteux* v. *London Ass. Co.*, 1739, 1 Atk. 548); and a ship insured "at and from Havana," which after entering the harbour and while proceeding to the place for discharging her outward cargo struck against an anchor and suffered loss, was held to be protected by the policy (*Haughton* v. *Empire M. I. C.*, 1865, L. R. 1 Ex. 206). After the risk has once attached, it will continue all the time that the vessel lies in the port preparing for the voyage; and any delay which is due to necessity or a purpose connected with the voyage, and is not more than is reasonable for that purpose, will not discharge the underwriter (*Motteux's* case above, repairs; *Langhorn* v. *Allnutt*, 1812, 4 Taun. 511; 13 R. R. 663, getting simulated papers; *Grant* v. *King*, 1802, 4 Esp. 174; 6 R. R. 849, waiting for a particular crew; *Raine* v. *Bell*, 1808, 9 East, 195; 9 R. R. 533, getting provisions), and what is reasonable is "determined by the state of things existing in the port where the vessel is" (Tindal, C.J., *Phillips* v. *Irving*, 1844, 7 M. & G. 328). The fact of another policy covering the ship after she arrives with an outward cargo does not prevent a policy on a homeward risk attaching (*Camden* v. *Cowley*, 1763, 1 Black. W. 417). The port "at and from" which the vessel is

insured, includes what is commercially part of it, and not merely what legally belongs to it (*Constable* v. *Noble*, 1810, 2 Taun. 403; 11 R. R. 617; Bridport is not Lyme: *Payne* v. *Hutchinson*, 1808, *ibid.* 405; 11 R. R. 620; Llanelly is not Carmarthen: *Sailing Ship Eastern Co.* v *Hickie*, 1889, 15 Q. B. D. 580, Brett, M. R.); and may mean an open roadstead (*Cockey* v. *Atkinson*, 1819, 2 Barn. & Ald. 460; 21 R. R. 357; *Sea I. C.* v. *Gavin*, 1830, 2 Dow & C. 124). Under the words "at and from a port or ports," or "place or places," a ship is protected in sailing to different places to take in cargo (*Lambert* v. *Liddard*, 1814, 5 Taun. 479; 15 R. R. 557); a policy "at or from" a West Indian island or district containing several ports, attaches directly the ship has been moored in good safety at the first port at which she touches in order to discharge outward cargo (*Camden* v. *Cowley*, *ante*), and the ship is protected in going from port to port of the island (*Cruickshank* v. *Janson*, 1810, 2 Taun. 301; 11 R. R. 584, Jamaica; *Warre* v. *Miller*, 1825, 4 Barn. & Cress. 538, Grenada), unless the words refer to only one port, *e.g.* "at and from the ship's port of loading in Jamaica," when it will attach at that port only (*Brown* v. *Taylor*, 1835, 4 Ad. & E. 241; and see *Hunting* v. *Boulton*, 1895, 1 Com. Cas. 120).

(*b*) *Freight.*—As already seen, there are three kinds of freight: (1) chartered freight; (2) ordinary freight; (3) the profit made by the shipowner carrying his own goods in his own ship. The risk does not begin at the same time in (1) as it does in (2) and (3).

(1) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded the risk attaches as soon as she arrives there in good safety (rule 3 of the Bill).

As chartered freight is a sum agreed to be paid by the charterer to the shipowner for the time of his ship as a vehicle for his goods for the voyage specified in the charter-party, an insurable interest in it arises when the ship has begun to perform her part under the charter-party, *i.e.* arrives at the port of departure in a seaworthy condition, whether she is ready to take in the chartered cargo or not. The charter-party and the policy may or may not cover quite the same voyage; in the latter case the freight may be insured on a voyage only part of which is chartered, and the chartered part may come first or last in the insured voyage (*Thompson* v. *Taylor*, 1795, 6 T. R. 478; 3 R. R. 233; *Foley* v. *United F. & M. I. C.*, 1870, L. R. 5 C. P. 155; *Barber* v. *Fleming*, 1869, L. R. 5 Q. B. 59; *Potter* v. *Rankin*, 1873, L. R. 6 H. L. 83; *Horncastle* v. *Suart*, 1806, 7 East, 400; 8 R. R. 649; *Davidson* v. *Willasey*, 1813, 1 M & S. 313; 14 R. R. 438; *Atty* v. *Lindo*, 1805, 1 Bos. & P. N. R. 236; 8 R. R. 788; *Ellis* v. *Lafone*, 1853, 8 Ex. Rep. 546).

If, however, the words of a freight policy limit the beginning of the risk to a definite time, *e.g.* the loading of the cargo, the risk will not attach before that happens (*Beckett* v. *West of England M. I. C.*, 1871, 25 L. T. N. S. 739); and the words "on freight beginning from the loading of the vessel," have been held to mean the complete loading (*Jones* v. *Neptune M. I. C.*, 1872, L. R. 7 Q. B. 702; *Hopper* v. *Wear M. I. C.*, 1882, 46 L. T. N. S. 107). Under a policy on "freight of meat at and from Monte Video to any ports in the Plate, and thence to United Kingdom, the assurance to begin upon freight from loading of goods at Monte Video," where the ship, owing to her refrigerating machinery going wrong (a loss for which the underwriters were to be responsible by the policy), earned no freight, and no meat was shipped at Monte Video, and both parties knew when the

policy was made that no meat could be shipped there owing to there being no refrigerating appliances there, it was held that the words "at and from the loading" must be struck out as insensible, and the risk attached at Monte Video (*Hydarnes S.S. Co.* v. *Indemnity M. M. A. C.*, [1895] 1 Q. B. 500, C. A.).

(2) and (3). Where freight other than chartered freight is insured "at or from" a particular place, the risk attaches *pro ratâ* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which one other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo (rule 3 of the Bill). An insurable interest in such freight (and it is immaterial for this purpose whose the goods are, *Flint* v. *Flemyng*, 1830, 1 Barn. & Ald. 45) arises, and the risk thereon begins either when the cargo is shipped (as expressed in the Lloyd's policy) or when the ship is ready to take the cargo, and the cargo is ready to be put on board the ship at the named port.

At first the rule seems to have been that the risk did not attach till the cargo was shipped (*Tonge* v. *Watts*, 1746, 1 Stra. 1251); it was then extended to cases where the cargo was partly shipped and partly not (*Montgomery* v. *Eggington*, 1789, 3 T. R. 362; 1 R. R. 718); and finally to cases where no cargo was shipped, but it was all ready to be so (*Truscott* v. *Christie*, 1820, 2 B. & B. 320; 23 R. R. 446; *Warre* v. *Miller*, 1825, 4 Barn. & Cress. 538). If the cargo is not shipped, it must be ready under a binding contract to that effect, or the risk on its freight will not begin (*Patrick* v. *Eames*, 1813, 3 Camp. 341, known as the Orchella Weed case), or part performance under a contract must be shown (*Truscott* v. *Christie*, *ante*). If the ship and cargo are not completely ready for each other, and no cargo is shipped, the risk will not attach (*Forbes* v. *Aspinall*, 1811, 13 East, 323; 12 R. R. 352; *Forbes* v. *Cowie*, 1808, 1 Camp. 520; *Devaux* v. *I Anson*, 1839, 5 Bing. N. C. 519; *Williamson* v. *Innes*, 1831, 8 Bing. 81, Lord Lyndhurst). But if the ship has never arrived at the port of loading, *à fortiori* the risk on freight thence will not attach, and a clause that "freight is to be earned from the engagement of the goods" must be read subject to this condition (*The Copernicus*, [1896] Prob. 237).

(*c*) *Goods.*—Where goods or other moveables are insured "from the loading thereof," the risk does not attach until they are actually on board, and the insurer is not liable for them while in transit from the shore (rule 4 of the Bill), *e.g.* in lighters, unless so expressly provided (*Hurry* v. *Roy. Ex. A. C.*, 1801, 2 Bos. & Pul. 430; 6 R. R. 804). The risk on goods attaches as soon as they are shipped, and the time of the ship's sailing does not affect it (*Johnson* v. *Bryant*, 1896, 12 T. L. R. 368). The words "from the loading thereof" where they follow "at and from" a specified port, imply, as a general rule, that the policy attaches only on goods loaded at that port, though the underwriter knows that goods have been previously loaded which the assured means to protect (*Hodgson* v. *Richardson*, 1763, 1 Black. W. 463; *Robertson* v. *French*, 1803, 4 East, 130; 7 R. R. 535; *Spitta* v. *Woodman*, 1810, 2 Taun. 416; 11 R. R. 628; and other cases quoted by Arnould, 379, 380). The following exceptions, however, have been recognised to this rule: (*a*) if there is anything in the policy to indicate that a prior loading was contemplated by the parties (Lord Ellenborough, *Bell* v. *Hobson*, 1812, 16 East, 240; 14 R. R. 337); *e.g.* policy declared to be in continuation of an earlier one giving liberty to the ship to take in goods wherever she might touch (*ibid.*); policy "beginning the adventure from loading on board ship whèresoever" (*Gladstone* v. *Clay*, 1813, 1 M. & S. 418; 14 R. R. 479);

reinsurance made subject to clauses of original policy on goods in African barter trade (*Joyce* v. *Realm I. C.*, 1872, L. R. 7 Q. B. 580); (*b*) if there has been a constructive loading at the port where the risk is to begin, *i.e.* if previously loaded goods have been landed and reloaded there for a new destination (*Nonnen* v. *Reid*, *Nonnen* v. *Kettlewell*, 1812, 16 East, 176; *Carr and Josling* v. *Montefiore*, 1864, 5 B. & S. 408); (*c*) where the policy contains a liberty to "touch, stay, and trade" or the like on a trading or bartering voyage (*Violet* v. *Allnutt*, 1811, 3 Taun. 419; 12 R. R. 676, goods loaded at Penzance under a policy "at and from Plymouth to Malta, with liberty to touch at Penzance"; *Barclay* v. *Stirling*, 1816, 5 M. & S. 6; 17 R. R. 245; *Hunter* v. *Leathley*, 1831, 10 Barn. & Cress. 858).

The port where the goods are to be loaded includes places which are commercially part of it (*Moxon* v. *Atkins*, 1812, 3 Camp. 200; 13 R. R. 789, "goods at and from Amelia Island to London" cover goods loaded at Tigre Island, the usual place for loading such cargoes). In policies on bartering voyages, *e.g.* in the African trade, it was common to have a clause to the effect that outward cargo is to be considered homeward interest twenty-four hours after arrival at the first port or place of trade, which protected both outward and homeward voyages (*Tobin* v. *Harford*, 1863, 13 C. B. N. S. 791); but in the absence of usage to such effect, such a clause in a time policy does not cover an outward cargo landed and stored in a factory for barter or native produce received in exchange for it but not yet shipped, and lost by fire (*Harrison* v. *Ellis*, 1857, 7 El. & Bl. 465).

The risk may also be prevented from attaching by the ship not sailing from the place of departure specified by the policy (s. 45 of the Bill; *Murray* v. *Columbian I. C.*, 1809, 4 Johns. N. Y. 443; Phillips, 931). The only exception to this is where the ship sails under a mixed policy, *i.e.* time as well as voyage, when she may start from the port of departure before the day specified for the beginning of the risk if she sails on the insured voyage, and the policy will attach on that day (*Way* v. *Modigliani*, 1787, 2 T. R. 30; 1 R. R. 412); for "the risk is then described to be at and from certain ports for the purpose of specifying what voyage is intended, and not for marking the commencement of the risk" (Phillips, 928, quoting *Manley* v. *United M. & F. I. C.*, 1812, 9 Mass. 85; and *Martin* v. *Fishing I. C.*, 1838, 20 Pick. Mass. 389).

(2) *Abandonment of the Voyage.*—But though the ship is at the place where the risk is to begin, or she sails from the specified port of departure, the policy will not attach if another entirely different voyage is intended (Phillips, 930); for if before the risk begins the destination of the ship is changed to a place not covered by the policy, this is an abandonment of the adventure which puts an end to the policy (s. 43 of the Bill; see *Way* v. *Modigliani*, above; so *Woolridge* v. *Boydell*, 1778, 1 Doug. 16 *a*; *Sellar* v. *Mc Vicar*, 1804, 1 Bos. & P. N. R. 23; 8 R. R. 744). In a recent case under an open policy on "goods as interest may appear or be hereafter declared from Mersey to any port in Spain this side of Gibraltar and thence by inland conveyance to any place in interior of Spain," and by marginal note any deviation or change of voyage not included in the policy was to be held insured at a premium to be arranged, where the goods were sent from Bradford by rail to Liverpool and thence to Madrid, being meant to be carried like former consignments by sea to Seville (this side Gibraltar) and thence to Madrid, but by mistake they were shipped in a vessel bound from Liverpool to Carthagena (beyond Gibraltar), and bills of lading were made out to Carthagena, and the assured declared the goods under the policy and

told the broker that the goods were going to Seville, and the ship was lost before reaching any Spanish port, it was held that the risk did not attach at Bradford or Liverpool, and the underwriters were not liable (*Simon Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303).

After the risk has begun under the policy, it continues till loss, or the termination of the adventure by arrival of the thing insured in safety, or by deviation (which includes delay in prosecuting it as well as departure from the right course of the voyage; see DEVIATION) or by change of voyage.

(3) *Change of Voyage.*—A change of voyage takes place where after the risk has begun the destination of the ship is changed from the destination contemplated by the policy (*Parkins* v. *Tunno*, 1809, 11 East, 22; 10 R. R. 422); and the destination of the ship is deemed to be changed as soon as the election to make it is made (s. 44 (1) of the Bill). The difference between deviation and change of voyage is that the former will not avoid the policy till it is actually begun, while the latter avoids it as soon as it is determined upon though the ship is still on the right course or has not even started (*Tasker* v. *Cunningham*, 1819, 1 Bli. P. C. 87; 20 R. R. 33); but if her immediate destination is covered by the policy it is immaterial that under a charter-party she has a further destination (*Hall* v. *Brown*, 1814, 2 Dowl. P. C. 367). Undertaking an intermediate voyage or putting into an intermediate port though intended before the voyage began, is not a change of voyage, if the master means finally to proceed to the original destination, especially if caused by necessity (*Driscol* v. *Passmore*, 1798, 1 Bos. & Pul. 200; 4 R. R. 782, a fear of pirates; *Heselton* v. *Allnutt*, 1813, 1 M. & S. 46). If, however, such intermediate voyage be not within the scope of the agreed voyage, or justified by necessity or usage, the mere fact that the master still intends to proceed to the original destination does not prevent it being a change of voyage (*Bottomley* v. *Bovill*, 1826, 5 Barn. & Cress. 210; *Salvador* v. *Hopkins*, 1765, 3 Burr. 1707, East India trade usage). The mere fact of taking in cargo and clearing out for an intermediate port is not a change of voyage, though it may be a deviation if carried out (*Kewley* v. *Ryan*, 1794, 2 Black. H. 343; 3 R. R. 408).

(4) *End of Risk.*—The risk under a policy ends at the time agreed therein, whatever that may be; but by the statutory policy the risk on ship is expressed to continue "till she hath moored at anchor twenty-four hours in good safety," and that on goods (and freight, see *post*) "until they be there (*i.e.* at the port of destination) discharged and safely landed."

(*a*) *Ship.*—If no other time than that in the statutory policy be expressed, the underwriter's liability ends twenty-four hours after the ship moors at anchor in good safety (*Mercantile M. I. C.* v. *Titherington*, 1864, 34 L. J. Q. B. 11). Mooring in good safety means (1) mooring in a state of physical safety, and the ship being able to keep afloat while her cargo is being unloaded (*Shawe* v. *Felton*, 1801, 2 East, 109; 6 R. R. 394); (2) mooring in a state of political safety, *i.e.* not subject to embargo, seizure, or capture by the government of the port or strangers (*Minett* v. *Anderson*, 1794, 1 Pea. 277; 3 R. R. 692; *Horneyer* v. *Lushington*, 1812, 15 East, 46; 13 R. R. 759); but mere liability to seizure upon arrival is not equivalent to seizure when that only takes place several days afterwards (*Lockyer* v. *Offley*, 1786, 1 T. R. 252; 1 R. R. 194, for smuggling); and (3) it means mooring so as to have an opportunity of discharging, or the risk will continue (*Waples* v. *Eames*, 1746, 2 Stra. 1243; *Samuel* v. *Roy. Ex. A. C.*, 1828, 8 Barn. & Cress. 119; and so in United States, *Zacharie* v. *New Orleans I. C.*, 1827, 5 Mart. N. S. (La.) 637; *Dickey* v. *United I. C.*, 1814, 11 Johns.

N. Y. 358). Any mooring place will, however, satisfy the policy, if final, though it be not the best, *e.g.* a ship on arriving at the London dock, where she was to unload, and owing to there being no room for her inside being moored outside, lashed to other vessels for seven days, and then being forced adrift by the ice and lost, is not covered by the policy (*Angerstein* v. *Bell*, 1795, Par. 55; Arnould, 413 ff.; Phillips, 968 and 969). The word "safety" refers to the ship and not to her moorings (Bovill, C.J., *Lidgett* v. *Secretan*, 1871, L. R. 5 C. P. 190).

If the statutory clause is not in the policy the risk on ship continues till her safe arrival at her port of destination, but will cease immediately upon her being moored at the usual place of discharge there (Arnould, 418; Bramwell, B., *Stone* v. *M. I. C. O. L. of Gottenburg*, 1875, 1 Ex. D. 81). In policies expressing the risk to continue "until arrival," the question of arrival is one of fact, determined by the general usage at the port (*Lindsay* v. *Janson*, 1859, 4 H. & N. 699; and see *Whitwell* v. *Harrison*, 1848, 2 Ex. Rep. 127).

If the port of destination on an outward voyage is an island or district containing several ports, the risk (in the absence of stipulation or usage) ends immediately after the ship has been moored for twenty-four hours in safety at the first port at which she stops to discharge the bulk of her cargo; and if she be lost afterwards in coasting from one port to another, that loss falls on the homeward policy, if there is one, and not on the outward policy anyhow (*Camden* v. *Cowley*, 1763, 1 Black. W. 417; *Barrass* v. *London A. C.*, 1782, Park. 64). If the outward cargo has already substantially been discharged it makes no difference that a small part of it is still on board (either as ballast or because it could not be sold) at the time of loss (*Leigh* v. *Mather*, 1795, Marsh. 214; 5 R. R. 740; *Inglis* v. *Vaux*, 1813, 3 Camp. 437; 14 R. R. 778; *Moore* v. *Taylor*, 1834, 1 Ad. & E. 25). If only a small part of the cargo has been discharged at a port of distress, and the ship originally meant to discharge all or part of her cargo at another port, the risk continues till that other port (*Leigh* v. *Mather*, above). The risk on ship will not end till she has moored twenty-four hours in good safety at the first port at which she was intended to unload, and at which she actually breaks bulk in order to unload all or part of it; if the port into which she puts is one to which she was originally destined, and she is lost after being moored there twenty-four hours in good safety, the risk ends although she has not actually broken bulk, but is only preparing to do so (Arnould, 422). Entering a port with only a contingent purpose to unload there if circumstances should make it expedient does not make it the port of discharge (*Lapham* v. *Atlas I. C.*, 1833, 24 Pick. Mass. 1).

The policy may express the risk to continue on a ship "to her port of discharge," which means the port at which it was originally intended that the goods shall be delivered (*Clason* v. *Simmonds*, 1741, Park. 444 *n.*; and so held in United States; Phillips, 962); or "to her port or ports of discharge," which means the port where she substantially discharges her cargo, or the great bulk of it, though she may have discharged some at a previous port (Arnould, 425, quoting cases; so in United States, *Upton* v. *Salem Comm. I. C.*, 1844, 8 Metc. Mass. 605); or "to a named place and her port of discharge," which means that the named port is not the port of discharge, and the risk continues till the latter (*Stephens* v. *Beverley I. C.*, 1820, Mass.; Phillips, 963); or "to her final port of discharge or destination," which is not the port where the ship might have been originally meant to discharge, but where she actually does discharge her cargo (*Moffat* v. *Ward*, 1784, 4 Doug. 29); and where a ship destined for China unloaded a good deal of her cargo

at Madras, but still had on board that part of it which had been destined for China, she was held covered till she got to China (*Preston* v. *Greenwood*, 1784, 4 Doug. 28). But the words "final port" need not mean that of discharge, but may mean that of loading for a subsequent voyage; thus, where the insurer on a policy "at and from Sydney to Newcastle, and thence to any port or ports, place or places, West Coast of South America, and for thirty days in port after final arrival," reinsured his risk "at and from Newcastle (N. S. W.), to any port or ports, place or places, West Coast of South America, and for thirty days after arrival in final port," and the ship sailed from Newcastle to Valparaiso, discharged all her cargo there, and after staying there more than thirty days loaded ballast and some cargo for Talcahuano (West Coast of South America), meaning to sail home thence with full cargo, and was lost on the way thither, it was held that the loss was covered by the policy (*Crocker* v. *Sturge*, [1897] 1 Q. B. 330).

The last port of discharge means the last friendly port of discharge (Bayley, J., *Browne* v. *Vigne*, 1810, 12 East, 283; 11 R. R. 375); and so a policy "to any of Windward or Leeward Isles," means to any of such isles as are friendly (*Neilson* v. *Delacour*, 1798, 2 Esp. 619).

The duration of the risk may be shortened by the consent of the parties, *e.g.* consignee agreeing to take delivery at an intermediate port (*Shapley* v. *Tappan*, 1812, 9 Mass. 20, U. S.), but the risk on a ship insured for a fishing voyage is not ended by her sending home part of her cargo by another ship which arrived safely before loss (*Phillips* v. *Champion*, 1815, 6 Taun. 3); or it may be ended by the act of the assured (*Stone* v. *M. I. C. of Gottenburg*, 1875, 1 Ex. D. 81).

The risk may, on the other hand, be prolonged by usage of trade (*Salvador* v. *Hopkins*, *ante*), or by oversight (*Mercantile M. I. C.* v. *Titherington*, 1864, 5 B. & S. 765).

(*b*) *Freight and Goods.*—The risk on freight and goods ends at the same time, for the former cannot be at risk unless the latter are (Marshall, *Insurance*, p. 225).

Where the risk on goods continues until they are safely landed (as in the Lloyd's policy) they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases (Rule 5 of the Bill). Landing in the customary manner means landing at the customary place in the port (*Gracie* v. *Maine I. C.*, 1814, 8 Cranch. 75, U. S.). Where goods are customarily landed in lighters or shallops or other light craft, from the ship to the shore, any loss during that transit falls on the underwriters (*Pelly* v. *Roy. Ex. A. C.*, *ante*, Lord Mansfield), *e.g.* in public lighters in the port of London (*Rucker* v. *Roy. Ex. A. C.*, 1784, 2 Bos. & Pul. 423; *Hury* v. *Roy. Ex. A. C.*, 1800, *ibid.* 430; 6 R. R. 804); or in the contraband trade in the Spanish Main (*Matthie* v. *Potts*, 1802, 3 Bos. & Pul. 23); or by custom in a shallow bay of Jamaica (*Stewart* v. *Bell*, 1821, 5 Barn. & Ald. 238; 24 R. R. 342); and the law is the same in the United States (Phillips, 970; Arnould, 391). But if the assured receives the goods into his own lighter or craft, or into his care, the underwriters' liability is at an end (*Sparrow* v. *Carruthers*, 1745, 2 Stra. 1236; *Strong* v. *Natally*, 1804, 1 Bos. & P. N. R. 16; 8 R. R. 741). Goods in order to be "landed" must be put ashore, and are not covered if merely taken out of the ship and put into lighters in order to be transhipped (*Houlder* v. *Merchants M. I. C.*, 1886, 17 Q. B. D. 354); but they may be "landed" and the underwriters' liability in respect of them cease, though they never get into the hands of the consignees at all, *e.g.* put into Government warehouses (*Brown* v. *Carstairs*, 1810, 3 Camp. 161).

When landed they will be at the assured's risk unless placed there only for a temporary purpose connected with the voyage, or so as to be protected by trade usage (*Pelly* v. *Roy. Ex. A. C.*, *ante*; *Harrison* v. *Ellis*, 1851, 7 El. & Bl. 465; in United States, *Parsons* v. *Mass. F. and M. I. C.*, 1810, 6 Mass. 197). Any damage to goods as well as loss of them while being unloaded from ship into lighter or *vice versâ*, is at the underwriter's risk, as it is also if it occurs during transhipment and that is allowed by the policy (*Tierney* v. *Etherington*, 1743, 1 Burr. 348 *n.*); but the words "risk of transhipment or landing and transhipment" have been held not to cover a loss by fire to goods landed and warehoused, waiting to be transhipped, in the absence of usage (*Australian Agric. Co.* v. *Saunders*, 1875, L. R. 10 C. P. 668).

A reasonable time after arrival is what is reasonable according to the nature and usages of the trade, the object of the adventure, and the opportunity of discharge (Arnould, 395 and 396); and is a question of fact (*Parkinson* v. *Collier*, 1797, Park. 470; *Noble* v. *Kennoway*, 1780, 2 Doug. 510).

XII. Effect of the Policy.

(1) *Losses covered by the Policy.*—As a general rule the underwriter is liable under the policy to make good any loss due to perils insured against in it, but such loss must be proximately caused by such a peril, or he will not be liable (s. 55 (1) of the Bill; *Dudgeon* v. *Pembroke*, 1874, L. R. 9 Q. B. 581, 595, Blackburn, J.).

The necessity for determining the proximate cause of a loss is often due to there being an express warranty in the policy exempting the underwriter from losses falling within those warranties. A ship insured "free from capture and seizure," and owing to her stranding being captured, is a loss by perils of the sea (*Livie* v. *Jansen*, 1810, 12 East, 648; 11 R. R. 513); so, *e.g.*, a ship insured "free from American condemnation," and owing to her stranding being captured and condemned by the American Government, is a loss by condemnation, and the underwriters are not liable (*Hahn* v. *Corbett*, 1824, 2 Bing. 205). Where a ship warranted "free from all capture and all consequences of hostilities," and owing to the extinguishing of a light on shore, wrecked, and part of her cargo could have been saved but for the interference of hostile troops, it was held that this was a loss by hostilities, and the underwriters were only liable for the loss of such of the cargo as could not have been saved, the putting out of the light not being a general consequence of hostilities (*Ionides* v. *Universal M. I. C.*, 1863, 14 C. B. N. S. 259).

Other illustrations are: if a ship is wrecked on an island inhabited by savages who plundered her cargo, the wreck is the proximate cause of loss (*Boudrett* v. *Hentigg*, 1816, Holt, 149; 17 R. R. 625). A loss of voyage caused by a prohibition of trade, blockade, or occupation by an enemy of the port of destination, is not a loss by "restraints, detentions, etc. of kings, princes, and rulers," because the adventure is prevented by fear of perils, and not the perils themselves (*Hadkinson* v. *Robinson*, 1803, 3 Bos. & Pul. 388; 7 R. R. 786; *Lubbock* v. *Rowcroft*, 1803, 5 Esp. 50; 8 R. R. 830; *Foster* v. *Christie*, 1809, 11 East, 205; 10 R. R. 470); and a ship which finds her destination blocked in this way is not protected while sailing to the nearest friendly port for necessary supplies and repairs (*Parkin* v. *Tunno*, 1809, 11 East, 22; 10 R. R. 422). If, however, cargo is discharged owing to the probability of its causing a fire before arrival at its destination, the freight thereby lost is a loss under the policy (*The Knight of St. Michael*, 1898, 14 T. L. R. 189). Though collision is a peril of the sea, the damages which the ship in fault for the collision has to pay to the other ship are not covered by the policy (*De Vaux* v. *Salvador*, 1836, 4 Ad. & E. 420), but

have to be provided for by a special clause to that effect, called the "running down clause." So where chartered freight is insured, and by a clause in the charter the charterer has an option of determining the charter, and does so, this is not a loss which the shipowner can recover from his underwriter as proximately caused by a peril insured against (*Mercantile S.S. Co.* v. *Tyser*, 1881, 7 Q. B. D. 73; *Inman S.S. Co.* v. *Bischoff*, 1882, 7 App. Cas. 670); but if there is no option, but only a provision that payment of hire shall cease in a given event, *e.g.* collision, fire, or stranding preventing the working of the ship, it is a loss under the policy (Lord Watson, *Bischoff's* case, *ante*; *The Alps*, [1893] Prob. 109; *The Bedouin*, [1894] Prob. 1).

The underwriter is also not liable for any loss attributable to the misconduct of the assured (or his agents), though a peril insured against be the proximate cause of loss (s. 55 (2) of the Bill) (*Thompson* v. *Hopper*, 1856, 6 El. & Bl. 191, Lord Campbell; *Tanner* v. *Bennet*, 1825, Ry. & M. 182; so *Meyer* v. *Ralli*, 1875, 1 C. P. D. 358; *Dawson* v. *Atty*, 1806, 7 East, 367). But such misconduct must be wilful, or the underwriter will be liable, *e.g.* negligent navigation by the assured, who is master of the ship, resulting in loss is covered by the policy (*Trinder* v. *N. Queensland I. C.*, 1897, 2 Com. Cas. 216, Kennedy, J.); and a loss due to a mistake of judgment on the part of the assured or his agents, acting *bonâ fide* and with reasonable prudence, falls on the underwriters (*Wilbraham* v. *Wartnaby*, 1830, H. & W. 144). Unless the policy otherwise provides, the underwriter is, however, liable for a loss proximately caused by a peril insured against, though it would not have happened but for the misconduct or negligence of the master or crew (s. 55 (2) of the Bill) (*Busk* v. *Roy. Ex. A. C.*, 1818, 2 Barn. & Ald. 73; 20 R. R. 350; *Walker* v. *Maitland*, 1821, 5 Barn. & Ald. 171; 24 R. R. 320; *Holdsworth* v. *Wise*, 1828, 7 Barn. & Cress. 794; *Redman* v. *Wilson*, 1845, 14 Mee. & W. 476; *Davidson* v. *Burnand*, 1868, L. R. 4 C. P. 117; *Good's* case, 1871, L. R. 6 C. P. 563; *Carmichael's* case, 1887, 19 Q. B. D. 242); and see *Warrantics, Seaworthiness*, above.

Unless a different intention appears from the terms of the policy, the insurer is not liable for any loss proximately caused by delay, although delay be caused by a peril insured against (s. 55 (3) of the Bill) (*Brockelbank* v. *Sugrue*, 1831, 1 Moo. & R. 102; *Taylor* v. *Dunbar*, 1869, L. R. 4 C. P. 206). But delay on the voyage will not exempt the underwriter from liability, though during the voyage events happen which enhance the risk, *e.g.* war (*Planché* v. *Fletcher*, 1779, 1 Doug. 251; *Brandon* v. *Nesbitt*, 1790, 6 T. R. 23; 3 R. R. 109); and in a policy on chartered freight, if such delay arises as frustrates the intended adventure commercially, and the charter is cancelled by the charterer, the shipowner can declare a total loss and recover it from the underwriters (*Jackson* v. *Union I. C.*, 1875, L. R. 10 C. P. 125; *Jamieson* v. *Newcastle S.S. F. I. A.*, [1895] 2 Q. B. 90); but a warranty that underwriters are not to be "liable for any claim consequent on loss of time, whether arising from a peril of the sea or otherwise," will protect them from liability (*Bensaude* v. *Thames and Mersey M. I. C.*, [1897] 1 Q. B. 29). The insurer is not, unless the policy so provides, liable for any loss caused by ordinary wear and tear, *e.g.* a leak if due to the unseaworthy state of the vessel and only the ordinary amount of straining to which she will be unavoidably exposed in the ordinary course of the voyage (*Fawcus* v. *Sarsfield*, 1856, 6 El. & Bl. 99; Phillips, 1105); or by ordinary leakage or breakage, *i.e.* the ordinary and inevitable amount of casualties happening in the ordinary course to the thing insured, but an alleged custom at Lloyd's,

to the effect that articles liable to such leakage or breakage, though not put in the common memorandum (see *post*), are always understood to be free of average, unless the ship grounded so violently as to disturb her stowage, has not been allowed to be recognised (*Crofts* v. *Marshall*, 1836, 7 Car. & P. 797, Lord Denman); or by the inherent vice or nature of the thing insured, *e.g.* fruit rotting, flour heating, wine going sour, meal going bad (*Taylor* v. *Dunbar*, 1869, L. R. 4 C. P. 206), cargo shipped in a wet or damaged state and heating (*Boyd* v. *Dubois*, 1811, 3 Camp. 132). Nor is he liable for loss due to the ordinary operation of natural causes, *e.g.* in the time of the slave-trade, slaves dying for want of water owing to the ship having missed her destination (*Gregson* v. *Ellis*, 1782, Park. 103), or slaves killed in a mutiny, unless warranted against mortality by mutiny (*Jones* v. *Schmoll*, 1785, 1 T. R. 130), or dying for want of food and water (*Tatham* v. *Hodgson*, 1796, 6 T. R. 656), or live animals perishing from the like cause (*Lawrence* v. *Aberdein*, 1821, 5 Barn. & Ald. 107; 24 R. R. 299; *Gabay* v. *Lloyd*, 1825, 3 Barn. & Cress. 793). The underwriter is not liable for loss by rats (*Hunter* v. *Potts*, 1815, 4 Camp. 203; 2 R. R. 353) or vermin (*Rohl* v. *Parr*, 1796, 1 Esp. 244, worms; 5 R. R. 741), though if thereby water be let into the ship and does damage, this is a peril of the sea (*Hamilton* v. *Pandorf*, 1887, 12 App. Cas. 518); or by any injury to machinery not caused by a peril insured against (s. 55 (4) of the Bill).

(2) *Total Losses.*—Losses are either total or partial. Total losses are either actual or constructive. An insurance against total loss includes constructive as well as actual total loss, unless the policy shows a different intention (s. 56 (1) (2) and (3) of the Bill; *Adams* v. *M'Kenzie*, 1863, 32 L. J. C. P. 92, "against total loss only"), but such words as "without benefit of abandonment" will show such intention (*ibid.*). An exception to this rule is made in policies on bottomry bonds, when "total loss" means only "actual total loss," for the bond is only void if the ship is an actual total loss (*Thompson* v. *Roy. Ex. A. C.*, 1813, 1 M. & S. 30; *Stephens* v. *Broomfield*, 1869, L. R. 2 P. C. 516; *Broomfield* v. *Southern I. C.*, 1870, L. R. 5 Ex. 192). If the assured brings an action for a total loss, and the evidence proves only a partial loss, he may recover for a partial loss, unless the policy otherwise provides, *i.e.* is expressed to be "free from average" (s. 56 (4) of the Bill; *Gardiner* v. *Croasdale*, 1760, 2 Burr. 904; *Benson* v. *Chapman*, 1848, 2 H. L. 696); the reason being that it is often impossible for the assured to know what the extent of the loss is when he first learns it, and what may be at first sight a total loss may eventually prove partial only, *e.g.* ship captured and then recaptured before action brought; for "the nature of the damnification at the time of action brought, is the sole criterion of the right to recover as for a total loss" (Lord Ellenborough; *McIver* v. *Henderson*, 1816, 4 M. & S. 583; 16 R. R. 550; *Patterson* v. *Ritchie*, 1815, *ibid.* 393; 16 R. R. 498).

(*a*) An *actual total loss* takes place when the thing insured is (1) destroyed, or (2) irreparably damaged, or (3) where the assured is irretrievably deprived thereof (s. 57 (1) of the Bill).

(1) *Destroyed.*—Thus it is an actual total loss of ship or goods if they are burnt, or are so dismembered as to lose their characteristic form, or, as it is called, cease to exist *in specie*, *e.g.* if a ship becomes a wreck (*Cambridge* v. *Anderton*, 1824, 2 Barn. & Cress. 691), or a fruit cargo rots (*Dyson* v. *Rowcroft*, 1803, 8 Bos. & Pul. 474; 7 R. R. 809), or a wheat cargo decomposes (*Cologan* v. *London Ass. Co.*, 1816, 5 M. & S. 447; 17 R. R. 390).

(2) Insurable property is irreparably damaged where it is so damaged

as to cease to exist *in specie*, or as that it cannot be rendered capable of arriving *in specie* at its destination; and it ceases to exist *in specie* when it no longer answers to the denomination under which it was insured (s. 57 (2) of the Bill).

Irreparable damage is often evidenced by the sale of the thing insured at a port of distress, owing to the commercial impossibility of its arriving in its original condition at its destination; but such sale must be justified by necessity, and only if so will it constitute an actual total loss under the policy, *e.g.* ship fixed on a rock, which was sold as she lay for £18, but was afterwards got off by the purchaser at an expense of £75, and after she had been repaired to the extent of £750 was worth £1200, is not a total loss (*Gardner* v. *Salvador*, 1831, 1 Moo. & R. 117); but a right sale will pass the property in the thing insured, and be an actual total loss (*Farnworth* v. *Hyde*, 1865, 34 L. J. C. P. 207; *Knight* v. *Faith*, 1850, 15 Q. B. 649).

If the thing insured is no longer the same thing as it was when insured, *e.g.* when a ship, "though it retains its shape, is a mere congeries of planks" (*Cambridge* v. *Anderton*, above), or a coal cargo is liable to spontaneous combustion (*Saunders* v. *Baring*, 1876, 34 L. T. N. S. 419; *The Knight of St. Michael*, 1898, 14 T. L. R. 189), it is an actual total loss. So also, if it cannot arrive at its destination the same thing as when it started on the adventure, it is an actual total loss (*Roux* v. *Salvador*, 1836, 3 Bing. N. C. 266). While if the thing insured does arrive or can arrive at its destination *in specie*, even though it cannot be restored to its original condition except at an expense exceeding its value, it is not an actual total loss, but may be a constructive one (see *post*) if notice of abandonment be given (*Shawe* v. *Felton*, 1801, 2 East; 6 R. R. 394; *Allen* v. *Sugrue*, 1828, 8 Barn. & Cress. 561). *A fortiori* to constitute an actual total loss of goods "free from average," the loss must involve their total destruction *in specie* either actual or inevitable, and any part of them arriving at their destination *in specie* prevents an actual total loss of them being claimed (*M'Andrews* v. *Vaughan*, 1793, Park. 185; *Mason* v. *Skurray*, 1780, Park. 191; *Anderson* v. *Roy. Ex. A. C.*, 1805, 7 East, 38; 8 R. R. 589; *Thompson* v. *Roy. Ex. A. C.*, 1812, 16 East, 214; *Headburg* v. *Pearson*, 1816, 7 Taun. 154; *Navone* v. *Haddon*, 1850, 9 C. B. 36). In the United States it has been held that a loss of 99 per cent. of the value will not be a total loss (Story, J., *Robinson* v. *Commonwealth I. C.*, 1838, 3 Sumn. C. C. 221). This is so although the value of such goods will not be equivalent to the expense of getting them to their destination.

(3) Irretrievable deprivation of the thing insured is an actual total loss, *e.g.* actual destruction of it, ship or goods going to the bottom of the sea (*Doyle* v. *Dallas*, 1831, 1 Moo. & R. 48; *Anderson* v. *Roy. Ex. A. C.*, above), or capture or detention of it by a foreign Government which never restores it (*Mellish* v. *Andrews*, 1813, 15 East, 13; 13 R. R. 351), or by a British warship, leading to its judicial sale for the benefit of the captors, though on appeal this decree is reversed, if the cargo is never restored (*Mullett* v. *Sheddon*, 1811, 13 East, 304; 12 R. R. 347), or seizure of it, and its sale pending an appeal by its captors, though the Prize Court had ordered it to be restored (*Stringer* v. *English, etc., M. I. C.*, 1869, L. R. 4 Q. B. 676). Sale of the subject of insurance is also a total loss of it, not only as evidence of irreparable damage (as seen above), but also as evidence of deprivation, *e.g.* sale by an Admiralty Court at the instance of salvors (*Cossman* v. *British Am. A. C.*, 1887, 13 App. Cas. 160; *Stringer's* case, above). There may also be a total loss of part of the cargo (see *post*, *Partial Loss*).

Freight is totally lost by deprivation when "the event on which its

being earned depends is made absolutely impossible or practically hopeless by a peril insured against" (Arnould, 1020; Brett, J., *Rankin* v. *Potter*, 1873, L. R. 6 H. L. 99). Whether there is an actual total loss of freight thus depends on the nature of the contract under which it is due, whether it be a charter-party or an ordinary bill of lading freight, for in the former case the arrival of the ship is generally the essential condition, and if she is lost no question can arise as to the cargo; while in the latter case the arrival of the goods is the essential point, and although the ship be lost the goods may be transhipped, and the freight earned (*Potter* v. *Rankin*, above). Accordingly, an actual total loss of freight takes place (*a*) if the ship is totally lost before shipping the cargo, and no substituted ship is allowed (*Potter* v. *Rankin*, above); (*b*) if both ship and cargo perish together; (*c*) when the ship is prevented by sea perils from loading cargo, except after a long prior delay, and the freighter rescinds the contract (*Jackson* v. *Union M. I. C.*, 1873, L. R. 8 C. P. 572; *Tully* v. *Howling*, 1877, 2 Q. B. D. 182), for a delay caused by sea perils, which commercially defeats the contract, ends it as much as the sea perils; (*d*) when ship and cargo are separated by the loss and sale of the ship, and a substituted ship cannot complete the voyage (*Mount* v. *Harrison*, 1827, 4 Bing. 388); (*e*) when the master sells the cargo justifiably at an intermediate port, and under the policy the assured can recover the whole freight for the cargo sold, giving up to the underwriter the freight subsequent to the sale; (*f*) and where the charter-party stipulates that the freight, or any part of a perishable cargo delivered sea damaged is to be two-thirds of the charter-rate, and the shipowner only insures one-third of it, and the cargo is delivered sea damaged on the whole, the underwriter is liable for a total loss on that one-third (*Griffiths* v. *Bramley Moore*, 1878, 4 Q. B. D. 70; see Arnould, 1021, 1022).

Similarly, there is a total loss on a policy on profits or commissions if the goods do not arrive at their destination owing to sea perils (*Asfar* v. *Blundell*, [1895] 2 Q. B. 196), and on a policy on disbursements, *i.e.* advances made by the charterer to the master of a ship to be repaid out of the freight earned by the ship's arrival at her destination, if the ship is prevented by sea perils from earning her freight (*Currie* v. *Bombay Native I. C.*, 1869, L. R. 3 P. C. 72).

In the case of an actual total loss, no notice of abandonment need be given (s. 57 (3) of the Bill), the reason being that there is nothing to be abandoned to the underwriter (see *post*), whether it be of ship (*Cambridge* v. *Anderton*, above), goods (*Mellish* v. *Andrews*, *ante*), or freight (*Potter* v. *Rankin*, *ante*). Under policies on profits and commissions there is never any need of abandonment (Arnould, 1023; Phillips, 1503, 1504, 1654, 1658).

An actual total loss, in cases where it cannot be proved, may be presumed if the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received (s. 58 of the Bill). In this case there is no need to abandon, for it is presumed that there is nothing to abandon (*Houstman* v. *Thornton*, 1816, Holt, 242; 17 R. R. 632). What is a reasonable time depends on the circumstances of the particular case (*Greene* v. *Browne*, 1744, 2 Stra. 1199; *Newby* v. *Reid*, 1762, Marsh. 490; *Houstman* v. *Thornton*, above). Proof must be given that the ship was really bound for, and sailed on the voyage insured (*Cohen* v. *Hinckley*, 1809, 2 Camp. 51; 11 R. R. 660; *Twemlow* v. *Oswin*, 1809, 2 Camp. 85; 11 R. R. 670; *Koster* v. *Reed*, 1826, 6 B. & C. 19; *Koster* v. *Innes*, 1825, Ry. & M. 333).

Where, by a peril insured against, the voyage is interrupted at an intermediate port or place under such circumstances as, apart from any

special stipulation in the contract of the affreightment, to justify the master in landing and reshipping the goods, or in transhipping them and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment (s. 59 of the Bill). For the circumstances which justify the master in landing or transhipping the goods, see CARGO; SHIP. It is enough here to say that such a course, if not expressly allowed by the charter-party, must be justified by necessity; thus if the policy gives express leave to tranship, no necessity need be made out, but otherwise it must (*Oliverson & Brightman* v. *Bold & Rotherham*, 1846, 8 Q. B. 781, 797; see *Risk, ante*; *Plantamour* v. *Staples*, 1781, Marsh. 129).

Where the goods can only be transhipped at a higher rate than the freight in the contract under which they were shipped, it seems that this is a loss which falls on the underwriters on the goods, for the goods owner is liable to pay such increased freight if such transhipment is for his benefit (Arnould, 743; Phillips, 1138, 1462), provided that the original ship has been prevented by perils insured against from carrying the cargo to its destination, and that a total loss will ensue on the cargo if it were not carried on. Lord Mansfield in one case declared that "the underwriter on a cargo has nothing to do with freight," and refused to allow the assured to recover from an underwriter on goods for *pro ratâ* freight which the goods owner had been ordered by a Prize Appeal Court to pay on restoration of the ship being decreed; but this cannot be regarded as a general rule (*Baillie* v. *Mondigliani*, 1785, Park. 90). The expenses of transhipment may, however, fall on the underwriters on freight, if thereby a total loss of freight is prevented (*Kidston* v. *Empire M. I. C.*, 1866, L. R. 1 C. P. 535, Willes, J.).

(*b*) *Constructive Total Loss.*—When a thing insured is not actually lost, within the definitions given above, but its value is commercially gone, *i.e.* its worth at the place of destination is not equal to the expense of getting it there, this is a constructive total loss. "In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost. For instance, if a shilling is dropped in deep water where it can be seen, but the expense of recovering it will be more than a shilling, it is for commercial purposes lost" (Maule, J., *Moss* v. *Smith*, 1850, 9 C. B. 103).

(i.) *Ship.*—In the case of damage to a *ship*, there is a constructive total loss where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired (s. 60 (1) of the Bill). A ship which is so injured that it cannot sail without repairs, and yet cannot be taken to a port where repairs can be done, is an actual total loss (Willes, J., *Barker* v. *Janson*, 1868, L. R. 3 C. P. 303); but, on the other hand, that ship, if it can be taken to a port and repaired, though those repairs will exceed its value when repaired, is only a constructive total loss, and notice of abandonment must be given (see *post*; *Furneaux* v. *Bradley*, 1779, Park. 257); and a ship may be abandoned at her port of destination if she arrives there a mere wreck (*Shawe* v. *Felton*, 1808, 2 East, 129; 6 R. R. 394).

In estimating the cost of repairs, the expense of future salvage operations, and any future general average contribution to which the ship would have been liable, must be taken into account (s. 60 (1) of the Bill). The expense of extricating the ship from a difficult or dangerous position is a necessary preliminary to her repairs and is included in them (*Mount* v. *Harrison*, 1827, 4 Bing. 388; *Doyle* v. *Dallas*, 1831, 1 Moo. & R. 48; *Gardner* v. *Salvador*, *ibid.* 116; so in United States, *Bradlie* v. *Maryland*

I. C., 1838, 12 Peters S. C. 378; Phillips, 1551). A general average contribution due from the ship is also included in the repairs as being a deduction from her value (*Kemp* v. *Halliday*, 1866, L. R. 1 Q. B. 520). General average contributions due to the ship, if unpaid, need not be taken into account as they pass to the underwriter on abandonment; but, if paid, they must be deducted from the repairs, even though ship and cargo are owned by the same person (Arnould, 1051, quoting Phillips, 1545). Freight earned by the ship and in the shipowner's hands is not part of her value for the purpose of estimating whether the ship is a constructive total loss or not (*Parker* v. *Budd*, 1897, 2 Com. Cas. 47).

The cost of repairs is calculated by taking into account all the circumstances surrounding the ship at the time and place of the casualty (Arnould, 1047), *e.g.* difficulty in obtaining materials for repair (*Thompson* v. *Colvin*, 1830, Ll. & W. 140; *Read* v. *Bonham*, 1821, 3 B. & B. 147; 23 R. R. 587); the fact that the insured ship had a Dutch register, and that it was a Dutch usage not to employ stranded ships again; and that a Dutch ship would be worth less when repaired in England than an English ship (*Young* v. *Turing*, 1841, 2 Man. &. G. 593). The United States law allows partial repairs at the place of casualty to be added to the final repairs of the ship at home (Phillips, 1548); and Arnould approves this (1047). Both by our law and that of the United States, where the ship is decayed at the time of loss, and the necessity for the repairs may fairly be referred to the perils insured against, and the ship is shown to be seaworthy when she sailed, it is not necessary to exclude the expense of the repairs rendered requisite by the decayed state of the ship from the estimate of the cost of repairs, because, except for the accident, the decayed parts of the ship might have been strong enough for the voyage (*Phillips* v. *Nairne*, 1847, 4 C. B. 343; *Depeyster* v. *Columbian I. C.*, 1804, 2 Caines N. Y. 85), for "the underwriter is liable for pre-existent defect unless it goes so far as to make the ship not seaworthy" (Livingston, J., *ibid.*, quoting Millar, *Insurance*; and so *Peele* v. *Merchants I. C.*, 1822, 3 Mas. C. C. 27; Story, J., *Hyde* v. *Louisiana I. C.*, 1824, 2 Mart. N. S. (La) 410, Porter, J.; Phillips, 1547). It has been held in the United States (and apparently would be here) that in estimating the whole expense of making the ship fit to navigate again, the usual deduction (see *post*, *Partial Loss*) of one-third new for old is not allowed (Story, J., *Bradlie* v. *Maryland I. C.*, 1838, 12 Peters S. C. 400; and Phillips approves, 1543).

The value of the ship when repaired is her actual value to her owner when repaired, and not her contractual value under the policy (*Irving* v. *Manning*, 1848, 1 H. L. 817). The law in the United States has been similarly stated in the Supreme Court (Story, J., *Patapsco I. C.* v. *Southgate*, 1831, 5 Peters S. C. 604); and consequently a special clause has been added in Boston policies to make the insured value the standard in cases of constructive total loss, which, under their law, happens if the cost of repairing the thing insured would exceed half the repaired value (Phillips, 1539; Arnould, 1055). An attempt to do this in England has failed, owing to the words in the policy not being sufficiently express (*Forwood* v. *North Wales M. I. C.*, 1880, 9 Q. B. D. 732). If the ship is an ordinary one available for any trade, her value is her selling price or market value; but if she is peculiar and built for a particular trade, it has been suggested that her standard in such a case should be her original price, less her estimated subsequent deterioration (*African S.S. Co.* v. *Swanzy*, 1856, 2 Kay & J. 664; *Grainger* v. *Martin*, 1863, 31 L. J. Q. B. 186). If a master repairs his ship abroad on bottomry under justifying circumstances,

and brings her home charged with a bottomry bond, the assured shipowner, who has given notice of abandonment, cannot recover for a total loss, because the amount due on the bottomry bond exceeds the value of the ship which is sold to satisfy it, for "the underwriter does not insure against a loss by hypothecation" (Cresswell, J., *Benson* v. *Chapman*, 1849, 2 H. L. 696; and so in United States Story, J., *Bradlie* v. *Maryland I. C.*, *ante*); but if the underwriters dissuade the owner of a ship, which is apparently disabled, from abandoning, and themselves do the repairs, they make themselves liable for a total loss if, when the ship arrives charged with a bottomry bond, they refuse to discharge it and let her be sold to satisfy the bond (*Da Costa* v. *Newnham*, 1788, 2 T. R. 407); and the United States Supreme Court has held that the right of the assured to abandon in a case of sea damage or shipwreck, once vested, cannot be defeated by the underwriters offering to bear all the expense of repairing her (Story, J., *Peele* v. *Merchants I. C.*, 1822, 3 Mas. C. C. 27; Phillips, 1557). It has already been noticed that the doctrine of constructive total loss does not apply to policies on bottomry bonds.

There is also a constructive total loss of ship if the assured is deprived of the possession of her by a peril insured against, and it is doubtful whether he can recover her, as the cost of recovering her would exceed her value when recovered (s. 60 (2) of the Bill), *e.g.* by capture, arrest, detention, or embargo.

Capture gives a right to abandon and claim a total loss so long as the ship remains in the possession of the captors, although she is never condemned or carried into any port or fleet of the enemy (Lord Mansfield, *Goss* v. *Withers*, 1758, 2 Burr. 694), provided the capture continue to the time of bringing the action (*Hamilton* v. *Mendes*, 1758, *ibid.* 1212); but if the ship be restored before action is brought, undamaged or only partly damaged, it is only an average loss, for "the nature of the damnification at the time of action brought is the sole criterion of the right to recover as for a total loss" (Lord Ellenborough, *Patterson* v. *Ritchie*, 1815, 4 M. & S. 393; 16 R. R. 498; see *Bainbridge* v. *Neilson*, 1808, 10 East, 329; 10 R. R. 316; *Parsons* v. *Scott*, 1810, 2 Taun. 362; 11 R. R. 610; *Falkner* v. *Ritchie*, 1814, 2 M. & S. 290; 15 R. R. 253; *Naylor* v. *Taylor*, 1829, 9 B. & C. 718). Restoration of the ship after action brought, but before judgment given, will not, however, prevent a total loss being recovered (*Rodocanachi* v. *Elliott*, 1873, L. R. 8 C. P. 649; *Ruys* v. *Roy. Ex. A. C.*, [1897] 2 Q. B. 135). The effect of a restoration may also be nullified by the condition the ship is in when she is restored; for "she must, after recapture, be *in esse* in the country of her owner, under such circumstances that he may, if he pleases, take possession of her, and be reasonably expected to do so" (Bayley, J., *Holdsworth* v. *Wise*, 1828, 7 Barn. & Cress. 799), *e.g.* a ship is a total loss which has been abandoned, salved, and brought home, but the salvage expenses exceeded her value (*ibid.*); so is a ship bottomried by a stranger to the owner (*e.g.* on arrival) and brought home, and not being equivalent in value to the bottomry expenses; but if in such case she were bottomried by her owner or his agent, he could not claim a total loss (*Chapman* v. *Benson*, 1848, 2 H. L. 696; *Fleming* v. *Smith*, 1848, 1 *ibid.* 513); so is a ship captured and recaptured, if her salvage is not worth the reward due for salving her (*McIver* v. *Henderson*, 1816, 4 M. & S. 576; 16 R. R. 550; *Brown* v. *Smith*, 1813, 1 Dowl. P. C. 359; 14 R. R. 78). Arrest, detention, or embargo equally give a *primâ facie* right to abandon, where it is probable that the owner's loss of the free use and disposal of his ship at one time total thereby may be of long,

or, at all events, uncertain continuance (Arnould, 1040; Phillips, 1531), *e.g.* detention for three years by a foreign Government (*Rotch* v. *Edie*, 1795, 6 T. R. 413; 3 R. R. 222), while one for eleven days by a British Government will not (*Forster* v. *Christie*, 1809, 11 East, 205; 10 R. R. 470). No precise time is fixed by English law as that within which notice of abandonment must be given; it is only necessary that it should be not more than what is a reasonable time under the particular circumstances (see *post*); though such a time may be fixed by contract, *e.g.* "to pay a total loss thirty days after receipt of official news of embargo or capture without waiting for condemnation" (*Fowler* v. *English and Scotch M. I. C.*, 1865, 18 C. B. N. S. 8). If a ship has been seized, condemned, and sold by order of a foreign Court, and the master repurchases the ship *bonâ fide* on account of the owners and brings her safe home, and the owners may, if they please, retake possession of her on paying the master's disbursements and expenses, they cannot refuse to do so and recover a total loss by such refusal, if they have not given notice of abandonment (and *semble* if they have), whether the sale of the ship was legal or illegal (*M'Masters* v. *Shoolbred*, 1794, 1 Esp. 238; 5 R. R. 735; *Wilson* v. *Forster*, 1815, 6 Taun. 25; 16 R. R. 560; Arnould, 1043); and the law in the United States is the same (Phillips, 1890 ff.). A mere loss of voyage will not justify abandoning and claiming a total loss (*Brown* v. *Smith*, 1813, 1 Dowl. P. C. 359; 14 R. R. 78; *Falkner* v. *Ritchie*, *ante*).

Any one of the foregoing deprivations, in order to entitle the assured to abandon and claim a total loss, must be complete, *e.g.* ship abandoned by her crew from exhaustion in working the pumps and brought home by some of the crew of a brig which had taken the ship's crew on board, is not a total loss (*Thornely* v. *Hebson*, 1819, 2 Barn. & Ald. 513; 21 R. R. 381; so *Lozano* v. *Janson*, 1869, 2 El. & Bl. 100; *Dean* v. *Hornby*, 1854, 3 *ibid.* 190).

(ii.) *Goods.*—In any case, other than that of a ship, there is a constructive total loss where the thing insured is so damaged or affected by a peril insured against that, having regard to cost, it is not reasonable to require the adventure to be prosecuted to its termination; and for the purpose of determining what is reasonable, regard must be had to the course which would be pursued by a prudent uninsured owner under such circumstances (s. 60 (3) of the Bill), but this is subject to the rule as to cost given above.

Alike in the case of goods or freight, the test of a constructive total loss is whether the value of the thing insured at the end of the risk will exceed the expense of getting it there.

In the case of goods, if the ship is disabled and no substitute can be got, and the cargo is perishable and sea damaged, the master may sell it at a port of distress for the benefit of all concerned, and the assured on goods may recover a total loss by abandonment; but if it can be sent on so as to arrive in a merchantable condition without any extraordinary delay or sacrifice, the master must send it on, and the assured cannot, by abandoning, claim a total loss (*Roux* v. *Salvador*, *ante*; *Saunders* v. *Baring*, 1864, 34 L. T. N. S. 419; *Meyer* v. *Ralli*, 1876, 1 C. P. D. 358). If the cargo be not perishable, or, if perishable, is not so damaged as to be liable by destruction or delay, though there are no means of transhipment immediately available, the master cannot sell it, or the owner by abandoning claim a total loss (*Currie* v. *Bombay Native I. C.*, 1869, L. R. 3 P. C. 72). The test in respect of sea-damaged goods is whether it is possible or not to send them on to their destination at a cost less than their value on arrival, whether they are insured "free from average" or not (*Moss* v.

Smith, 1850, 9 C. B. 94; *Rosetto* v. *Gurney*, 1851, 11 C. B. 176; *Farnworth* v. *Hyde*, 1866, L. R. 2 P. C. 204; *Reimer* v. *Ringrove*, 1851, 6 Ex. 263), for "the memorandum does not vary the rules upon which a loss shall be total or partial: it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions; it has no application whatever to a total loss or the principle on which a total loss is to be ascertained" (Lord Abinger, *Roux* v. *Salvador*, *ante*).

Mere retardation or loss of voyage, in the case of goods insured "free from average" (as in the case of ship), owing to no means of transhipment, does not justify abandonment and a claim for a total loss, unless the goods are perishable, and probably will perish before reaching their destination if kept at the port of distress till they can be forwarded (*Anderson* v. *Wallis*, 1813, 2 M. & S. 240; 14 R. R. 642, cargo of copper, iron, and nails; *Hunt* v. *Roy. Ex. A. C.*, 1816, 5 *ibid.* 55; 11 R. R. 264, flour; *Van Omeron* v. *Dowick*, 1809, 2 Camp. 42; 11 R. R. 656, cutlasses; *Wilson* v. *Millar*, 2 Stark. 1; 19 R. R. 670, crates, earthenwares, and Indian blues; *Wilson* v. *Roy. Ex. A. C.*, 1811, 2 Camp. 623; 12 R. R. 760, wheat; *Thompson* v. *Roy. Ex. A. C.*, *ante*, tobacco and sugar; *Navone* v. *Haddon*, 1850, 9 C. B. 30, waste silk). If there is no warranty against average, the fact of there being means of transhipment of the goods, which are either so damaged as not to be merchantable, or are capable of being sent on as damaged goods, has been held not to prevent a sale of the goods at their port of loading, where the ship has put back disabled, being justifiable, and the assured recovering a constructive total loss (*Gernon* v. *Roy. Ex. A. C.*, 1815, 6 Taun. 38; 16 R. R. 630; so *Hudson* v. *Harrison*, 1821, 3 B. & B. 97; 23 R. R. 575).

The following charges and expenses may be taken into account in determining whether the goods are worth sending on or not:—(1) cost of unshipping; (2) of drying and warehousing; (3) of transhipping; (4) increased freight of sending them on, but not if they are transhipped at the same freight, for this is on the original contract; (5) the amount of salvage allowed in proportion to the value of the cargo saved; if these exceed the value of the goods at the port of discharge, it is a constructive total loss on abandonment (*Rosetto* v. *Gurney*, 1851, 11 C. B. 176, 188; *Farnworth* v. *Hyde*, *ante*). The expenses of bottomry cannot be taken into consideration (Cresswell, J., *Rosetto* v. *Gurney*, *ante*). The fact that it is impracticable to send on the whole of the cargo is not conclusive of whether a sale by the master or abandonment by the assured is justifiable (*Moss* v. *Smith*, *ante*; *Rosetto* v. *Gurney*, *ante*); nor is a decree of a Vice-Admiralty Court abroad (*Reid* v. *Darby*, 1808, 10 East, 143; 10 R. R. 246; *Morris* v. *Robinson*, 1824, 3 Barn. & Cress. 196; *The Eliza Cornish*, 1853, 1 Sp. 36).

There may also be a constructive total loss of goods by deprivation (as in the case of ship), by capture, arrest, embargo (*Rotch* v. *Edie*, *ante*), barratrous seizure (*Dixon* v. *Reid*, 1822, 5 Barn. & Ald. 597; 24 R. R. 481), detention, or desertion (*Parry* v. *Aberdein*, 1829, 9 Barn. & Cress. 411), or sale (*Cologan* v. *London Ass. Co.*, 1816, 5 M. & S. 447; 17 R. R. 390). If, after capture, the goods exist *in specie*, and there is a chance of their recovery, notice of abandonment must be given to make it a total loss (*Tunno* v. *Edwards*, 1810, 12 East, 488; 11 R. R. 458); but restoration at any time before action brought, though not after that time, reduces it to a partial loss (see above). If news be received simultaneously of capture and restitution, notice of abandonment cannot be given, and such a notice given after final restitution is ineffectual, though the assured had not then

heard of it (Arnould, 1059; Phillips, 1662, quoting cases). With goods, as with ship, the right to abandon and claim a total loss depends on the situation of the goods when the action is brought; if they have been restored or brought to this country under such circumstances that the assured may, and may reasonably be expected to, take possession of them, it is not a total loss (*Holdsworth* v. *Wise*, 1828, 7 Barn. & Cress. 799; *Naylor* v. *Taylor*, 1829, 9 Barn. & Cress. 718); but if, when they are restored or made accessible to the assured, they are so damaged as to be worthless, though they still exist *in specie*, they are a total loss (*Dixon* v. *Reid*, *ante*; *Parry* v. *Aberdein*, *ante*).

(iii.) *Freight.*—In the case of freight the assured has "*primâ facie* a right of abandoning the freight where there has been a constructive total loss of the ship" (Tindal, C.J., *Benson* v. *Chapman*, 1846, 6 Man. & G. 810), and it has been laid down that abandonment of freight is never necessary unless there is something to abandon, even where there is only a constructive total loss of ship or goods (*Potter* v. *Rankin*, 1873, L. R. 6 H. L. 83). Where ship and cargo are justifiably sold abroad, the assured may recover for a total loss on freight without abandoning (*Green* v. *Roy. Ex. A. C.*, 1815, 6 Taun. 66; 16 R. R. 571; *Idle* v. *Roy. Ex. A. C.*, 1819, 3 Moore, 115; 21 R. R. 538); and the same may be the case when the ship only is sold justifiably (*Mount* v. *Harrison*, 1829, 4 Bing. 388); while if the sale of ship and cargo be unjustifiable, notice of abandonment will not make it a total loss, but is simply inoperative. Where there is something to abandon, *e.g.* where the ship can be repaired in a reasonable time, or the cargo be transhipped, the assured must give notice of abandonment in order to recover for a total loss of freight, for although the master may not be bound to tranship the cargo (if this be feasible) as against the shipper, the assured must give the underwriter on freight an opportunity of earning salvage on the freight. A policy "on freight" generally is satisfied if any freight be earned and does not apply to the freight of a particular cargo (*Barclay* v. *Stirling*, 1816, 5 M. & S. 66; 17 R. R. 245), so that if the original cargo be lost the ship can take another for the same voyage, and although the assured abandon when the first freight is lost, it will not be a total loss (*Everth* v. *Smith*, 1814, 2 *ibid.* 278; 15 R. R. 246); and if the policy be on freight of a particular cargo and that cargo is lost and another carried, though that is a total loss, the latter freight still will be salvage on the earlier one (*Green* v. *Roy. Ex. A. C.*, above).

It is not a constructive total loss on freight if the cargo or ship are unjustifiably sold, or if the expense of transhipping and conditioning the cargo would be only equal to the freight payable on it (*Moody* v. *Jones*, 1825, 4 Barn. & Cress. 494), though if it would exceed it, it is such a loss (*Michael* v. *Gillespy*, 1857, 26 L. J. C. P. 306); nor if the entire cargo cannot be sent on at a freight less than their expenses of earning that freight (*Moss* v. *Smith*, 1850, 9 C. B. 94); or if freight be eventually earned in full, although it may be swallowed up by bottomry expenses of the ship (*Brocklebank* v. *Sugrue*, 1831, 1 Moo. & R. 102; *Benson* v. *Chapman*, 1848, 2 H. L. 696).

There is a constructive total loss of freight where the assured is deprived of ship or goods by arrest, capture, embargo, or detention, which break up the voyage and postpone the earning of freight indefinitely, and the assured may give notice of abandonment and recover for a total loss if the property is not restored before action or the freight earned (Arnould, 1074). But if the freight be earned before action brought on such capture, etc., it is not a constructive total loss (*M'Carthy* v. *Abel*, 1804, 5 East,

388; 7 R. R. 711; *Scottish M. I. C.* v. *Turner*, 1848, 1 Macq. H. L. Cas. 334; *Everth* v. *Smith*, above).

(3) *Abandonment.*—(*a*) *Its Requisites.*—Where there is a constructive total loss, the assured may either treat the loss as a partial loss or abandon the thing insured to the insurer, and treat the loss as if it were an actual total loss; but he must make his election within a reasonable time (s. 61 of the Bill); *e.g.* a delay of eight months after capture of a ship, and three months after a Prize Court had ordered her to be released, and two months after an appeal by the captors, is too long (*Stringer* v. *English and Scottish M. I. C.*, 1869, L. R. 4 Q. B. 676). The abandonment must be entire and absolute; and where several distinct subjects are insured together, *e.g.* ship, freight, and cargo, or different kinds of goods, one cannot be abandoned without the other (Arnould, 984; Phillips, 1659, 1660). But if distinct articles are separately insured, or separately valued in one policy, they can be abandoned separately (*Amery* v. *Rodgers*, 1794, 1 Esp. 208; 5 R. R. 731; *Deidericks* v. *Comm. I. C.*, 1813, 10 John. 234; Marshall, *Ins.* 612, though Phillips disapproves of this in the latter case, 1661).

Abandonment transfers the assured's interest no further than it is covered by the policy, so that if the underwriters demand more to be abandoned than is insured, this does not prevent the assured from abandoning up to the extent insured and recovering a total loss (*Havelock* v. *Rockwood*, 1799, 8 T. R. 268; 1 R. R. 703). It can only be made by a person who at the time of loss has an absolute right of ownership in the thing assured, *e.g.* a person with whom a policy is deposited in security for a loan to a shipowner cannot give notice of abandonment without the owner's express authority (*Jardine* v. *Leathley*, 1863, 32 L. J. Q. B. 132); but a mortgagor can, or a part owner who has insured for all the owners of a ship at their request (*Hunt* v. *Roy. Ex. A. C.*, 1816, 5 M. & S. 47; 17 R. R. 264), and so can a consignee of goods who has insured them "as interest may appear," if he has the right to the absolute possession of them (*Conway* v. *Gray*, 1809, 10 East, 536).

Where the assured elects to abandon to the insurer, he must give notice of abandonment; if he fails to do so, the loss can only be treated as a partial loss. Notice of abandonment may be given in writing, or by word of mouth, or partly by both, and may be given in any terms which indicate the intention of the assured to abandon the thing insured unconditionally to the insurer (s. 62 (1) and (2) of the Bill; *Read* v. *Bonham*, 1821, 3 B. & B. 147; 23 R. R. 587; *King* v. *Walker*, 1864, 33 L. J. Ex. 325; *Currie* v. *Bombay Native I. C.*, 1869, L. R. 3 P. C. 72, sufficient notices; *Thellusson* v. *Fletcher*, 1793, 1 Esp. 72, insufficient notice). The notice should be coupled with a statement of the grounds for abandonment, in order that the underwriters may determine whether to accept or not (Arnould, 959); but this is not necessary here, as it is in the United States, where it has been held that the assured cannot avail himself of any other ground than that alleged by him at the time of abandoning (*Suydam* v. *Marine I. C.*, 1806, 1 Johns. N. Y. 181; Phillips, 1681, 1684). Such notice must be given with reasonable diligence after the receipt of reliable information of a constructive total loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry (s. 62 (3) of the Bill); thus where the information and casualty are definite, a delay of five days has been held fatal (*Hunt* v. *Roy. Ex. A. C.*, above), and so has a delay of sixteen days (*Aldridge* v. *Bell*, 1816, 1 Stark. 498; 18 R. R. 814), or three days after the arrival of the ship insured, which a year before had been repaired for sea damage at a foreign port by the master with the

owner's approval (*Fleming* v. *Smith*, 1848, 1 H. L. 513); and notice given on March 11, when one of the owners living abroad had had certain knowledge of such loss on February 7, is too late (*Kaltenbach* v. *Mackenzie*, 1878, 3 C. P. D. 467). A loss which at first has been treated as partial may, on a change of circumstances, be justifiably treated as a total loss (*Stringer's* case, *ante*). Where the information and casualty are indefinite, a delay of four months has been held reasonable (*Browning* v. *Provincial I. C. of Canada*, 1873, L. R. 5 P. C. 274); and delay is justified which is necessary in order to ascertain the state of the damaged cargo, though not if made in order to judge of the state of the market (*Gernon* v. *Roy. Ex. A. C.*, 1815, 6 Taun. 381; 16 R. R. 630). Notice given a month after the assured had been occupied in getting the cargo out of a sunk ship, because it turned out more damaged than they expected (*Anderson* v. *Roy. Ex. A. C.*, 1805, 7 East, 38; 8 R. R. 589), or a year after proceeds of a captured cargo had been lodged with a person approved of by the owner on the former becoming bankrupt (*Mitchell* v. *Edie*, 1787, 1 T. R. 608; 1 R. R. 318), or five weeks after notification of a blockade at the port of destination, owing to which cargo was sold at a port where the ship was (*Barker* v. *Blakes*, 1810, 9 East, 283; 9 R. R. 558), or nine months after loss and partial repair of ship at a foreign port (*Potter* v. *Campbell*, 1867, 16 W. R. 401) is too late.

Where notice of abandonment has been given by the assured, it cannot be withdrawn without the consent of the insurer (s. 63 (4) of the Bill; Phillips, 1698). But though the assured cannot withdraw his notice, he may waive it by his subsequent conduct and deprive himself of the right to insist on it, *e.g.* if the master deals with the abandoned property in such a way as to exercise ownership over it under the directions of the assured, by repairing her or refitting (Phillips, 1699–1703). This contingency is, however, provided for by the waiver clause in the Lloyd's policy (see above).

Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment (s. 62 (5)).

The acceptance of an abandonment may be either express or implied from the conduct of the insurer (*ibid.* (6)); *e.g.* a request that the assured would do the best they could with the damaged property is not an acceptance (*Thellusson* v. *Fletcher*, 1793, 1 Esp. 72); but if the underwriter does repairs to the ship abandoned and keeps her some time till she is sold for salvage, that is an acceptance (*Prov. I. C. of Canada* v. *Leduc*, 1874, L. R. 6 P. C. 224; see *Shepherd* v. *Henderson*, 1881, 7 App. Cas. 49), even though done with the intention of surrendering her to the assured (in United States, *Cincinnati I. C.* v. *Bakewell*, 1844, 4 B. Minn. (Ky.) 541). The mere silence of the insurer after notice is not an acceptance (Story, J., *Peele* v. *Merchants I. C.*, 1822, 3 Mas. C. C. 27; *Prov. I. C. of Canada* v. *Leduc*, *ante*). Where notice of abandonment is accepted, the abandonment is irrevocable; and the acceptance of the notice conclusively admits the loss and the sufficiency of the notice (s. 62 (7) of the Bill), whether the loss be actually total or not. Thus where a ship insured was captured but restored before action brought, after acceptance of the notice of abandonment, the assured recovered a total loss (*Smith* v. *Robertson*, 1814, 2 Dow, 474; 14 R. R. 174; *Patterson* v. *Ritchie*, 1815, 4 M. & S. 393; 16 R. R. 498; Phillips, 1697). Notice is unnecessary where at the time when the assured receives information of the loss there would be no possibility of benefit to the insurer (s. 62 (8) of the Bill; *Rankin* v. *Potter*, 1874, L. R. 6 H. L. 83, 155, Lord Chelmsford). It may be waived by the insurer, *e.g.* by paying on demand for a total loss as in the case of a missing ship (*Houstman* v.

Thornton, 1816, Holt, 242; 17 R. R. 632; so in United States, Phillips, 1688). Where an insurer has reinsured his risk, no notice of abandonment need be given by him (s. 62 (10) of the Bill, adopting *Hastie* v. *De Peyster*, 1805, 3 Caines N. Y. 390 (U. S.), and *Uzielli* v. *Boston M. I. C.*, 1884, 15 Q. B. D. 11). Where the assured has given a notice of abandonment which has not been accepted, the validity of the abandonment must be determined with reference to the state of affairs at the time of action brought (s. 62 (11) of the Bill; *Holdsworth* v. *Wise*, *ante*; *Hamilton* v. *Mendes*, above).

(*b*) *Effects of Abandonment.*—Where there is a valid abandonment, whatever remains of the subject-matter insured thereupon vests in the insurer, and the insured is subrogated (*i.e.* succeeds) to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss (s. 63 (1) of the Bill; *Davidson* v. *Case*, 1816, 5 M. & S. 79; 17 R. R. 280); whatever remains of the thing insured is called the salvage, and losses which give a right to abandon are called *salvage losses*.

The underwriter may succeed not only to the rights of the assured, but also to his liabilities in respect of the insured property, *e.g.* liens for salvage and wages, so far as these arise out of the perils insured against; but if they do not so arise, they fall on the assured (*Williams* v. *Smith*, 1804, 4 Caines N. Y. 13, ship bottomried before she was insured); and the underwriter is only liable, as between himself and the assured, for the crew's wages due after the abandonment (Phillips, 1719 and 1720). If a cargo is insured and becomes a total loss, it has been held in the United States that the underwriter on it is not liable to pay freight on its salvage to the shipowner (*Columbian I. C.* v. *Catlett*, 1827, 12 Wheat, 383); and it has been held here that the assured in goods who has had to pay *pro ratâ* freight for goods accepted at an intermediate port, whether he abandoned or not, cannot recover that as a loss from his underwriters (*Baillie* v. *Mondigliani*, 1785, Park. 90). But Phillips is of opinion that the underwriter in such a case, if he takes to the salvage, which he is not bound to do, is liable for freight on the ground that he as the owner of the salvage alone derives benefit from its being carried on (1718). An underwriter on a ship which is sunk and is a nuisance to navigation is not the owner of her, if he never takes to her salvage in any way, so as to make himself liable to the harbour authority who incurs expense in removing her. See HARBOURS.

Upon abandonment any act or thing done, subsequent to the casualty causing the loss by the assured or his agents in respect of the subject-matter insured, is at the risk of the insurer, and for his benefit, provided such act or thing be done in good faith and reasonably (s. 63 (2) of the Bill), and not fraudulently and out of their ordinary duty or agency (Washington, J., *Dederer* v. *Delaware I. C.*, 1807, 2 Wash. C. C. 61, U. S.); *e.g.* in the United States it has been held that repurchase of a captured ship by her master is for the benefit of the underwriters if they choose to take to it (*Jumel* v. *Maine I. C.*, 1811, 7 Johns. N. Y. 423); and a justifiable sale of a stranded ship by the master (*Bryant* v. *Commonwealth I. C.*, 1828, 6 Pick. Mass. 131), or attempt by him to rescue a captured ship before abandonment (*Dederer's* case, above), or repurchase by him of a captured ship after abandonment, have all been held to be at the risk of the insurers (*United I. C.* v. *Robinson*, 1806, 1 Johns. N. Y. 591). But acts of the master done after abandonment, evidently not as agent for the underwriters, are not for their benefit, *e.g.* chartering another vessel to

carry on cargo or passengers is not for the benefit of underwriters on ship, for they will have no claim to the freight so earned (*Hickie* v. *Rodocanachi*, 1859, 4 H. & N. 455).

Upon the abandonment of a ship its insurer is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, but otherwise he acquires no rights in respect of any contract of affreightment which the assured may have (s. 63 (3) of the Bill; *Davidson* v. *Case*, 1816, 5 M. & S. 79; 17 R. R. 280; *Stewart* v. *Greenock M. I. C.*, 1849, 2 H. L. 159; *Hickie* v. *Rodocanachi*, above; *Yates* v. *Whyte*, 1838, 4 Bing. N. C. 272; so *Sea I. C.* v. *Hadden*, 1884, 13 Q. B. D. 706). Where the ship and freight are separately insured, and the shipowner upon a constructive total loss abandons to the underwriters on ship, and also under a policy on freight to the underwriters on freight, the freight will all go to the underwriters on ship if it is earned and they claim it, otherwise it will go to the underwriters on freight (*Case* v. *Davidson, ante*; *Stewart* v. *Greenock M. I. C., ante*; *Barclay* v. *Stirling*, 1816, 5 M. & S. 6; 17 R. R. 245). Any freight received after abandonment will go to the underwriter on ship, and the shipowner cannot recover for it (after abandoning to an underwriter on ship) from the underwriter on freight, for freight is not a total loss if it has been earned (*Scottish M. I. C.* v. *Turner*, 1849, 1 Macq. H. L. 334). By our law, the underwriter on freight is not entitled to any part of such freight; but in the United States the freight is apportioned between the underwriters on ship and freight; and if eight-ninths of the voyage is completed at the time of loss, the underwriters on ship are entitled to only one-ninth of the freight, and those on freight to the eight-ninths, which was the view taken by Bayley, J., in *Case* v. *Davidson, ante* (Phillips, 1740 and 1741). Freight, however, that has been earned prior to the loss goes to the underwriters on freight, as representing the shipowners, and not to those on ship (*The Red Sea*, [1896] Prob. 20, freight in part prepaid). In a case where a shipowner abandoned ship and freight to their respective underwriters owing to the long detention of the ship in a foreign port, and the underwriters on freight paid as total loss, the shipowner was allowed to make certain deductions from the salvage of the freight before paying it over to the underwriter on freight, such as expenses of shipping cargo home; and of ship and crew in a foreign port, port charges and wages during detention in that foreign port; but not charges on ship and cargo in the port of discharge, or cost of insurance home, or depreciation in her value by wear and tear (*Sharp* v. *Gladstone*, 1809, 7 East, 24; 8 R. R. 583; and *Barclay* v. *Stirling*, 1816, 5 M. & S. 6; 17 R. R. 245). Where the ship is carrying the owner's goods (and no freight is therefore payable) the insurer is entitled to a reasonable remuneration for their carriage subsequent to the loss (s. 63 (3) of the Bill; *Brown* v. *North*, 1852, 8 Ex. 1; *Miller* v. *Woodfall*, 1857, 8 El. & Bl. 493).

(4) *Partial Losses.*—(*a*) *Averages.*—These are either particular average or general average losses (s. 64 (1) of the Bill); for general average, see AVERAGE, *General*. A particular average loss is a loss caused by a peril insured against, which is not a general average loss, and which falls exclusively on the owner or other person interested in insurable property, giving him no right of contribution against other persons who may be interested in the common marine adventure (s. 64 (2) of the Bill), and which is recoverable by the assured, whose property suffers the particular average loss, from his underwriter. Particular average losses include masts sprung or carried away, planks started, vessel damaged by getting ashore or being strained through stress of weather so that its shape is distorted and its value materially

diminished, breaking of upper works or timbers of any part of the ship, loss by lightning, fire, collision, justifiable engagement, plunder and force, possession by captors and pirates, loss of boats, tearing off sheathing, repairing or replacing parts of ship injured or destroyed by perils insured against, though such parts may have previously become deteriorated by age and use, provided the ship is seaworthy (1424 and 1425); and the expense of raising funds to pay for repairing such losses is also particular average, *e.g.* maritime interest on loans (*ibid.*). The wages and provisions of the crew during detention for repairs are not, however, particular average in a policy on ship, nor is such an underwriter liable for them during detention by embargo (*Robertson* v. *Ewer*, 1785, 1 T. R. 127; 1 R. R. 164). The right to be reimbursed particular average may be excluded or limited by terms in the contract to that effect, *e.g.* the memorandum in the Lloyd's policy; see *post*, *Measure of Indemnity*, and AVERAGE.

(*b*) *Salvage Charges.*—Another kind of partial loss is salvage charges, which are recoverable in like manner as particular average losses (*i.e.* from the underwriter on the property salved), and are the charges recoverable by a salvor under maritime law (s. 65 of the Bill; and see SALVAGE); but such charges must be ascertained either by the award of a Court or by agreement between the assured and the salvors which is accepted by the underwriters; and if, when added to the other losses falling on the property insured, they would make the total so payable by the underwriters exceed the full insurance, such excess must be borne by the assured and not by the underwriters (*Aitchison* v. *Lohre*, 1879, 4 App. Cas. 765).

(*c*) *Particular Charges.*—Salvage charges do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them for the purpose of averting a peril insured against. Such expenses, when properly insured, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred (s. 65 of the Bill). But the expenses of salving agents employed by the assured who had reinsured were held to be not recoverable by the reinsured (who had again reinsured) beyond the amount of insurance from their reinsurers, the salvage work not being done by *their* factors or agents (*Uzielli* v. *Boston M. I. C.*, 1884, 15 Q. B. D. 11). Particular charges are recoverable under the "sue and labour" clause in the Lloyd's policy (see *post*), and include all expenditure made by the assured or his agents in order to avert loss to the thing insured (*Kidston* v. *Empire M. I. C.*, 1865, L. R. 1 C. P. 535), even beyond the limit of the insurance.

XIII. MEASURE OF INDEMNITY.

Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the loss as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy; and the liability of the insurer for expenses properly incurred under the sue and labour clause is determined on the same principle (s. 67 of the Bill); for instance, if the loss be £1000, and the insurable value of the thing insured be £2000, and one underwriter has insured it for £200, he is liable to the assured for £100; if the loss be £1000, and the thing insured is valued at £20,000, an underwriter for £1000 pays £50; if the expenses under the sue and labour clause are £25, and the value of the thing is £50, an underwriter for £40 will pay £20. The assured is his own underwriter for the proportion of the risk which he does not insure.

(1) *Total Loss.*—Where there is a total loss of the thing insured, if the policy be valued, the measure of indemnity is the sum fixed by the policy; if it be unvalued, the measure of indemnity (subject to the limit of the sum insured and any express agreement in the policy) is the insurable value of the thing (s. 68 of the Bill).

(2) *Partial Loss.*—Where a *ship* is damaged, but not totally lost, the measure of indemnity (subject to any express provision in the policy), if the ship has been repaired, is the reasonable cost of repairs, less the customary deductions, but not exceeding the sum insured in respect of any casualty (s. 69 (1) of the Bill; see *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 755). The customary deductions are one-third, new for old (*i.e.* for the new work which is substituted for the old) in respect of all repairs of damage sustained by a ship after her first voyage, and one-sixth for repairing chain cables; but the assured is entitled to charge the indemnities in full for graving dock expenses, cost of removals, use of shears, stages, and graving dock appliances, cost of anchors, provisions, and stores, cost of temporary repairs and of straightening bent iron work, and all repairs of damage to a vessel on her first voyage (Schedule 2 of the Act; *Fenwick* v. *Robinson*, 1828, 3 Car. & P. 323; *Pirie* v. *Steele*, 1837, 8 *ibid.* 200; Arnould, 940–944); and also with the full expense of painting. This rule of deduction is allowed even where the making good of new repairs to a ship was part of the average loss (*Poingdestre* v. *Roy. Ex. A. C.*, 1826, Ry. & M. 378), though, perhaps, it would not be if the loss fell exclusively on the new repairs, but this is not a likely case (Arnould, 943); and it applies, perhaps, only to wooden ships and not to iron ones (Arnould, 940; though the Bill makes no difference between them). Here the deduction of one-third is made from the expense of labour and materials used in repairs, and the value of the old materials is then deducted, the third being thus deducted from the gross repairs, while in the United States the old materials are applied towards the payment of the new labour and material, and the third is deducted from the balance, *i.e.* the net repairs, and, on principle, this is the more correct way (Phillips, 1434; Arnould, 944). If the ship has been repaired, and is then lost without ever coming into the owner's hands, no deduction is made, as he derives no benefit from the repairs (*Da Costa* v. *Newnham*, 1788, 2 T. R. 407); but if she is lost subsequently to repairs by the default of the assured, the deduction is allowed (*Humphrey* v. *Union I. C.*, 1824, 3 Mas. C. C. 429, Story, J.). Goods sold at a port of distress to pay for the repairs of a ship are an average loss, to be made good at the price the goods would have fetched at their destination, or at the price actually obtained, whichever is higher, if the voyage be completed in safety; but if it is not, then the latter price is the basis (Arnould, 945; Phillips, 1433). Where the ship, in the case given above, has been only partly repaired, the assured is entitled to the reasonable cost of such repairs computed as above, and also to be indemnified for the reasonable depreciation arising from the unrepaired damage, provided that the aggregate amount does not exceed the cost of repairing the whole damage computed as above. Where the ship has not been repaired, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage computed as above. Where the ship has not been repaired, and is sold in her damaged state during the risk, the assured is entitled to the reasonable cost of repairing such damage computed as above, but not exceeding the actual depreciation in the value of the ship as ascertained by the sale (s. 69 (2) (3) (4) of the Bill; the last proposition being that

stated by Cotton, L.J. in *Pitman* v. *Universal M. I. C.*, 1882, 9 Q. B. D. 192).

Where there is a partial loss of *freight*, the measure of indemnity (subject to the limit of the sum insured and any express provision in the policy) is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at risk (s. 70 of the Bill). Freight is generally insured by valued policies (see *ante*); but where only part of a cargo is loaded at the time of loss, the policy is opened, and the underwriter only pays that proportion of his subscription which the freight lost is of the whole freight intended to be covered (*Forbes* v. *Aspinall*, 1809, 13 East, 323; 12 R. R. 352), and the rule is the same with an open policy (*Forbes* v. *Cowie*, 1809, 1 Camp. 520); and thus where a ship is lost with only two-thirds of her cargo on board, the assured can only recover for two-thirds of the freight of the whole intended cargo if it is fully insured (*Tobin* v. *Harford*, 1863, 13 C. B. N. S. 791, a time policy). Adjustment on freight insured in open policies is made on the gross and not the net proceeds of the freight at the port of destination, by usage of Lloyd's, upheld by the Courts (*Palmer* v. *Blackburn*, 1822, 1 Bing. 61; 25 R. R. 559).

Where there is a partial loss of *goods*, the measure of indemnity (subject as above) is as follows: (1) where part of the goods insured by a valued policy is totally lost, the indemnity is such proportion of the sum fixed by the policy as the value of the part lost bears to the insurable value of the whole ascertained as in the case of an unvalued policy; (2) where part of the goods insured by an open policy is totally lost, the indemnity is the insurable value of the part lost, ascertained as in case of total loss (s. 71 (1) and (2) of the Bill); *e.g.* goods valued at £500 and insured for £200, the insurable value of which is £400, and of the part lost is £50, the underwriter pays one-eighth of his subscription, for the loss is one-eighth of the whole; and if goods are worth for insurance £100, and £25 of them are lost, the underwriter pays one-fourth of his subscription.

Where the whole or any part of the goods insured has been delivered damaged at its destination, the indemnity is the ratio of loss ascertained by comparing the gross sound and damaged values reduced to the same cash basis at the time and place of arrival applied to the sum fixed by the policy in the case of a valued policy or to the insurable value in the case of an unvalued policy (s. 71 (3) of the Bill). "Sound value" means the value for which the goods would have sold in the market if they had arrived sound; "damaged value" is the price for which they are actually sold in their damaged state; and the loss suffered by the assured is the difference between these two. This is not, however, the loss for which the underwriter is liable, for he is only liable up to the prime cost of the goods on board, or their agreed value when shipped; and he is not therefore concerned with the other constituents of a market price, *e.g.* freight, duty, and landing charges, and the profit in a gaining or loss in a losing market (*Usher* v. *Noble*, 1810, 12 East, 639; 11 R. R. 505; *Waldron* v. *Combe*, 1810, 3 Taun. 162; 12 R. R. 629, open policies; *Lewis* v. *Rucker*, 1761, 2 Burr. 1167, valued policy). The loss for which the underwriter is liable is the proportion of his subscription which the loss suffered by the assured bears to the sound value of the goods; for "the difference between the sound and damaged sales affords the proportion of loss in any given case, *i.e.* it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against. When this is ascertained it only remains to apply this

liquidated proportion of the loss to the standard by which the value as between the assured and the underwriter is calculated (*i.e.* the prime cost or value in the policy), and you have the one-half, fourth, or tenth in terms of money" (Lord Ellenborough, *Usher* v. *Noble*, above). In this way the sum which the underwriter has to pay depends solely on the relative extent of the loss, and will be the same whether the goods arrive at a gaining or losing market (Arnould, 932). The gross values, whether sound or damaged, are the proper standard, and not the net values, for in the latter case the measure of indemnity would vary with the condition of the market (Lawrence, J., *Johnson* v. *Sheddon*, 1802, 2 East, 581; 6 R. R. 516, the "Brimstone case"). Where any sale or other charges on damaged goods are paid or payable to the buyers, such charges must be added to the gross proceeds before establishing the ratio of damage, but in the event of a claim being established such charges are subsequently recoverable from the insurer as "extra charges" (s. 71 (5) of the Bill; Arnould, 935; *Hudson* v. *Marjoribanks*, 1823, 7 Moo. 463; 23 R. R. 575). The "gross value" means the price which a wholesale buyer would give with freight, landing charges, and duty paid beforehand; except that in the case of goods customarily sold in bond, the bonded price is the gross value. "Gross proceeds" mean the actual price obtained at a sale where all charges on sale are paid by the sellers (s. 71 (4) of the Bill). It is a common practice when out of whole packages or bales only a few articles in each arrive sound, to sell sound and damaged goods together; but in this case the diminished value at which the sound goods may sell owing to the assortment being broken, is not a loss for which the underwriter is responsible (*Cator* v. *Great Western I. C. of New York*, 1873, L. R. 8 C. P. 552).

Particular average losses are generally adjusted at the port of destination; but if they are adjusted elsewhere the mode of adjustment depends on the reason for making it; *e.g.* a justifiable sale of cargo on ship being unloaded for repairs is adjusted like a salvage loss, *i.e.* the underwriter pays the difference between the prime cost or value of goods and net proceeds of damaged sales. If, on the other hand, the assured puts an end to the risk at any place short of the destination to get a favourable market or the like, the loss on the goods is adjusted on the same principle as at the port of destination (Phillips, 1467; Arnould, 936).

Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their relative insurable values as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole ascertained as above in either case (s. 72 of the Bill).

In the case of general average contributions which the assured has paid, or is liable to pay for, the measure of indemnity is the full amount of such contribution if the thing liable to contribution is insured for its full contributory value, but if it is not insured for its full contributory value, or if only part of it be insured, the indemnity is reduced in proportion to the under insurance (s. 73 of the Bill); for the basis of liability between the assured is the insurable value, and not the contributory. Thus, supposing the interest to be fully insured, if the insurable value of the interest is equal to or greater than the contributory value, the underwriter repays that contribution in full; if the insurable value be less than the contributory value, he only pays the proportion which his subscription bears to the contributory value of the interest, for

the assured is his own insurer as regards the excess of the contributory value over the insurable value; while if the interest is only partly insured, the underwriter is liable to repay the contribution only to that partial extent, viz. in the proportion of his subscription to the insurable value. Thus where the value in the policy is £1000, and only half that amount is covered by the policy, and the property contributes on £1500, the underwriter is liable to refund 33⅓ per cent. only of the contribution, though 50 per cent. of the value of the property as between the parties is insured. If the property contributes on £500, the insurer is liable to refund half the contribution, for this indemnifies the assured for half the amount contributed, and he can ask no more (Phillips, 1410).

(3) *Memorandum.*—The measure of indemnity for partial losses may, however, be qualified by express terms in the policy; and the commonest example of this is the memorandum in the Lloyd's policy (given above), which runs thus—

> Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent., and all other goods also the ship and freight are warranted free from average under three pounds per cent., unless general or the ship be stranded.

The term "average unless general" means a partial loss other than a general average loss, and does not include particular charges (Rule 14 of the Bill); a general average loss, however small, is recoverable from the underwriters, but a particular average loss is not, unless it exceeds the specified percentage, in which case the underwriter is liable not merely for the balance over that percentage but for the whole loss (*Wilson* v. *Smith*, 1764, 3 Burr. 1550; *Dyson* v. *Rowcroft*, 1803, 3 Bos. & Pul. 474; 7 R. R. 809). "Corn" has been held to include malt (*Moody* v. *Surridge*, 1794, 2 Esp. 633; 5 R. R. 757), peas and beans (*Mason* v. *Skurray*, 1780, Par. 191), but not rice (*Scott* v. *Bourdillon*, 1806, 2 Bos. & P. N. R. 213; 9 R. R. 644). "Salt" does not include saltpetre (*Journu* v. *Bourdieu*, 1786, Par. 179). In the United States skins have been held to include deerskins (*Bakewell* v. *United I. C.*, 1801, 2 Johns. Cas. 246); but "skins and hides" not to include furs (*Astor* v. *Union I. C.*, 1827, 7 Cowen, 202). Where the ship has stranded the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached, and if the policy is on goods that the damaged goods are on board (Rule 15 of the Bill; *Burnett* v. *Kensington*, 1797, 7 T. R. 222; 4 R. R. 424, stranding in one part of the voyage counts, though the loss happen in another; *Roux* v. *Salvador*, 1836, 3 Bing. N. C. 266, stranding after goods had been landed does not count; *The Alsace Lorraine*, [1893] Prob. 209, Barnes, J.); and the warranty applies where the goods at risk under the policy were in lighters waiting for the arrival of the ship, when she stranded (*Thames and Mersey M. I. C.* v. *Pitts*, [1893] 1 Q. B. 476). The words "sunk or burnt" are sometimes added to "stranded." For the meaning of these terms, see STRANDING.

Where the interest insured is warranted free from particular average, the assured cannot recover for a loss of part, whether the policy be valued or open, unless the contract contained in the policy be apportionable; but if it be apportionable, the assured may recover for a total loss of any apportionable part. The contract is apportionable where by the policy itself separate parcels are separately valued, or where, by usage, the contract is treated as apportionable (s. 76 (1) of the Bill). "Where memorandum goods of the same species are shipped whether in bulk or in packages not

expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum excepts the underwriters from liability for a total loss or destruction of part only though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils" (*Ralli* v. *Janson*, 1856, 6 El. & Bl. 422). If memorandum goods are shipped and insured in bulk, or are shipped in separate packages and insured in bulk, a total loss of part is not recoverable in respect of them (*Hills* v. *London A. C.*, 1839, 5 Mee. & W. 569, £70 worth of wheat lost out of £1600; *Ralli* v. *Janson*, *ante*, 1023 bags of linseed lost out of 2688; so in United States, 300 out of 1100 boxes of lemons lost, *Humphrey* v. *Union I. C.*, 1824, 3 Mas. C. C. 429); but if goods so insured are separately valued, a total loss of part can be recovered (*Hills* v. *London A. C.*, *ante*); and in practice a clause is generally inserted in the policy to make it apportionable, *e.g.* "to pay average on each package as if separately insured," or "on each species as if separately insured"; but a declaration of value made subsequently to the making of the policy will not have this effect (*Entwistle* v. *Ellis*, 1857, 2 H. & N. 549).

Where such an insurance, though general, is on several separate articles wholly distinct in their nature, the contract is apportionable; *e.g.* policy on master's effects for £100, master allowed to recover a loss of two-thirds of them (*Duff* v. *Mackenzie*, 1857, 3 C. B. N. S. 16); and under one on goods, which was really an emigrant's equipment of agricultural implements, a total loss of part was recovered (*Wilkinson* v. *Hyde*, 18 *ibid.* 30). Where the interest insured is warranted "free from particular average," either generally or under a certain percentage, the insurer is nevertheless liable for salvage charges and for particular charges and other expenses properly incurred under the "sue and labour" clause in order to avert a loss insured against (s. 76 (2) of the Bill), *i.e.* "particular average" does not include salvage charges or particular charges (see *post*).

Unless the policy otherwise provides, where the interest insured is warranted free from particular average, under a specified percentage: (1) a general average loss or liability cannot be added to a particular average to make up the specified percentage (*ibid.* (3); *Wilson* v. *Smith*, 1764, 3 Burr. 1550, Lord Mansfield; *Pirie* v. *A1 Ships S. D. I. A.*, 1889, 22 Q. B. D. 580, Lord Esher; so in United States, Phillips, 1779); (2) in the case of a voyage policy, successive losses can be added together to make up the specified percentage (Story, J., *Donnell* v. *Columbian I. C.*, 1836, 2 Sumner, 366; *Blackett* v. *Roy. Ex. A. C.*, 1832, 2 Cromp. & J. 250, Lord Lyndhurst); and (3) in the case of a time policy, successive losses on the same voyage may be added together, but not losses occurring on different voyages, to make up the specified percentage (*Stewart* v. *Merchants M. I. C.*, 1886, 16 Q. B. D. 625).

For the purpose of ascertaining whether the specified percentage has been reached, regard is had only to the actual loss suffered by the interest insured, *e.g.* in the case of damaged goods the percentage of loss on the gross sound sale.

Thus particular charges (which are never included in particular average) and the expenses of and incident to ascertaining and proving the loss must be excluded in the calculation of the percentage; but conditioning charges and other expenses incurred at the port of destination, which diminish the loss to an extent exceeding the said charges and expenses, may be added to the loss eventually ascertained (s. 76 of the Bill). If the particular average without these charges exceeds the required percentage, these can be added to

the assured's claim against the underwriter; if it does not, they are borne by the assured. *A fortiori* if they are incurred for examining part of the insured goods which are not damaged, they are not recoverable under a policy making average recoverable on each package separately (*Lysaght* v. *Coleman*, [1895] 1 Q. B. 49).

The percentage is calculated on the amount at risk at the time of loss, whether there be a greater amount at risk under the policy subsequently or not (*Rohl* v. *Parr*, 1796, 1 Esp. 445; 5 R. R. 741). When the articles are enumerated (as in the five per cent. clause) and insured in gross, the percentage is calculated on the whole of each enumerated article; when they are not enumerated (as in the three per cent. clause), it is taken on the aggregate value of them, unless they have been separately valued, when the former method is adopted (Phillips, 1786 and 1788). Where the same kind of goods, not enumerated, are shipped in separate packages, the percentage is calculated on the whole, and not on each package (Arnould, 836). The assured may, however, protect himself by stipulating in the policy "to pay average on each separate article insured as if separately insured," or "on each species as though separate interests separately insured" (*Oppenheim* v. *Fry*, 1864, 3 B. & S. 873). Where the damage exceeds the required percentage on the whole amount, the assured may calculate it either on the whole or on the damaged packages, *e.g.* where ten cases are shipped and insured, and one is damaged fifty per cent. and the others only one per cent. each, all the damage may be recovered (*Hagedorn* v. *Whitmore*, 1816, 1 Stark. 157). Here the percentage is calculated either on the valuation (if valued) or insurable value (if open policy), without deducting the premium for that amount (Arnould, 838), as has been done in the United States (but Phillips does not approve it, 1790).

(4) *Successive Losses.*—Unless the policy otherwise provides, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured. Where, under the same policy, a partial loss which has not been repaired or made good is followed by a total loss, the assured can only recover for the total loss, unless anything further is recoverable under the "sue and labour" clause (s. 77 of the Bill; *Livie* v. *Janson*, 1810, 12 East, 648; 11 R. R. 513, partial loss by stranding, followed by total loss by condemnation); but this rule does not extend outside the scope of one policy; and a partial unrepaired loss may be recovered under one policy and a total loss under another (*Lidgett* v. *Secretan*, 1871, L. R. 6 C. P. 616; *Barker* v. *Janson*, 1868, L. R. 3 C. P. 303, ship a constructive total loss by sea damage when the policy attached on her; *Woodside* v. *Globe A. C.*, [1896] 1 Q. B. 105, ship insured by valued policy against fire only, and becoming a total loss by stranding, and while stranded being burnt, is a loss under the policy against fire).

Where a partial loss has been repaired, the assured may recover for it from the underwriter though a total loss afterwards happen (*Cheminant* v. *Pearson*, 1812, 4 Taun. 367; *Stewart* v. *Steele*, 1842, 11 L. J. C. P. 155).

(5) *Sue and Labour Clause.*—There is an obligation in all cases on the assured and his agents to take all reasonable measures for the purpose of averting or minimising a loss, *e.g.* landing and reconditioning damaged cargo if necessary (*Notara* v. *Henderson*, 1872, L. R. 5 Q. B. 346); but for this he can generally claim reimbursement under the "sue and labour" clause on the sale mentioned at p. 196, above. This clause in a policy of insurance is a supplementary contract to the policy, and the assured can recover from the insurer any expenses properly incurred under it although the underwriter has paid for a total loss, and the interest has been warranted

free from particular average, either generally or under a certain percentage (s. 78 of the Bill). For the form of the "sue and labour" clause, see the Lloyd's policy above. Under this clause the underwriter is only liable for the expenses of "suing and labouring" by the assured, his factors, servants, and assigns," and is thus not liable under a reinsurance policy for such work done by the insured's servants (*Uzielli* v. *Boston M. I. C.*, 1885, 15 Q. B. D. 11), nor (under this clause) for general average losses, or contributions, or salvage charges (*Aitchison* v. *Lohre*, 1879, 4 App. Cas. 755). By the "waiver" clause (see above), no acts of the insurer or insured in recovering, saving, and preserving the property defeat the right of the assured to abandon.

Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the "sue and labour" clause (s. 78 (3) of the Bill), *e.g.* under policy on iron rails f. p. a., there being no risk of total loss, extra freight of necessary transhipment is not so recoverable (*Great Indian and Peninsular R. C.* v. *Saunders*, 1861, 30 L. J. Q. B. 218); and a similar decision was given in similar circumstances under a similar policy on bacon f. p. a. (*Booth* v. *Gair*, 1863, 15 C. B. N. S. 291). But under a policy "on chartered freight warranted f. p. a.," where a guano cargo had to be transhipped owing to the disabling of the ship, it was held that the expenses of transhipment, landing, warehousing, and reloading the cargo were recoverable under this clause, for there would have been a total loss of freight if the cargo had not been transhipped (*Kidston* v. *Empire M. I. C.*, 1866, L. R. 1 C. P. 535, Willes, J.); and under a policy on live cattle against risks, including mortality, where the ship, owing to a breakdown of machinery, had to put into a port of distress for repair, the expense of extra fodder for the cattle there was held recoverable, as necessary to prevent a total loss of the cattle (*The Pomeranian*, [1895] Prob. 349). The expense must be shown to be proper and necessary, or it will be disallowed. Thus, under a policy on freight, where the ship stranded and the cargo had to be transhipped, the expense of forwarding it by rail to its destination, at a cost of £200, was not allowed to be recovered, as it was shown that it could have been transhipped at a cost of £70 (*Lee* v. *Southern I. C.*, 1870, L. R. 5 C. P. 397).

(6) *Liabilities to Third Persons.*—Where the assured effects an insurance in express terms against any liability to a third party, the measure of indemnity (subject as above) is the amount paid or payable by him to such third person in respect of such liability (s. 74 of the Bill). Instances of such liabilities are the shipowner's liability as regards sending on his passengers in case of shipwreck (*Gibson* v. *Bradford*, 1855, 3 El. & Bl. 51; *Willis* v. *Cooke*, 1856, 5 *ibid.* 641; M. S. A. 1894, ss. 331–335), or in case of collision (M. S. A. 1894, s. 506; and see *Insurable Interest*).

XIV. Rights of Parties under the Policy.

(1) *Rights of Assured.*—Under the policy the assured is entitled to recover for losses to the subject of insurance, as has been already described; but in addition thereto, owing to the fact that the policy is a contract of indemnity only, he may be entitled to returns of premium, and for these the underwriter is directly liable to him.

Returns of premium may be claimed either by stipulation to that effect in the policy, *e.g.* on the happening of a particular event, or because the consideration for the premium wholly or partly fails by no risk, or only part of the risk, being run. In the former case the chief reported examples are supplied by policies on war risks, *e.g.* return of premium to be made if

ship sails with convoy and arrives (*Simonds* v. *Boydell*, 1779, 1 Doug. 270; *Aquilar* v. *Rogers*, 1797, 7 T. R. 421; 4 R. R. 478). Under such a stipulation, if the ship were captured after arrival the assured was still held entitled to a return of premium, as well as the whole insurance for a total loss (*Horncastle* v. *Haworth*, 1806, Marsh. 539); and "arrival" may mean arrival at the final port of destination, though there are several stipulations for return of different portions of premium in respect of different parts of the voyage, *e.g.* ship insured "at and from Lisbon to Cadiz, and thence to Flushing, at a premium of 20 guineas per cent., to return 8 guineas if she sailed with convoy from Cadiz for England, and 2 guineas more for convoy from England to Flushing, or 10 guineas if ship sailed with convoy for voyage and arrived," was captured while going from England to Flushing, and it was held that no return of the 8 per cent. could be made (*Kellner* v. *Le Mesurier*, 1803, 4 East, 396; 7 R. R. 581, ship lost before arrival by a peril not insured against); but this depends on the wording of the policy (*Leevin* v. *Cormac*, 1811, 4 Taun. 483; 13 R. R. 654). A stipulation for a return of premium "for arrival" is similarly construed (*Dalgleish* v. *Brooke*, 1812, 15 East, 295; 13 R. R. 476, ship being lost on arrival by a peril not insured against, return allowed). Other such stipulations are to make a return "if ship sails with convoy" (*Langhorn* v. *Allnutt*, 1812, 4 Taun. 510; 13 R. R. 663; *Meyer* v. *Gregson*, 1784, Marsh. 528; *Audley* v. *Duff*, 1800, 2 Bos. & Pul. 111; 5 R. R. 549); or "if ship is sold or laid up," which has been held to mean a permanent laying-up (*Hunter* v. *Wright*, 1830, 10 Barn. & Cress. 714); or "to return 2 per cent. if risk ends at Emden instead of United Kingdom" (*Ionides* v. *Harford*, 1859, 29 L. J. Ex. 36). In all cases where the premium is returnable in whole or in part it is usual to allow the underwriter ½ per cent., unless the contrary be expressly stipulated (Arnould, 1121).

In the second case there are two general rules: (*a*) The premium is returnable to the assured if the consideration for it wholly fails, and there has been no fraud or illegality on the part of the assured or his agents (s. 83 (1) of the Bill; *Tyrie* v. *Fletcher*, 1777, 2 Cowp. 666). Fraud by the assured prevents the premium being returned (*Tyler* v. *Horne*, 1785, and *Chapman* v. *Fraser*, 1793, Marsh. 525); but mere misrepresentation without fraud by him does not, if the risk has never attached (*Feise* v. *Parkinson*, 1812, 4 Taun. 639; 13 R. R. 710; *Anderson* v. *Thornton*, 1853, 8 Ex. Rep. 425). Illegality by the assured, *i.e.* making an illegal policy, or a policy on an illegal adventure, prevents the premium being recovered, unless the contract is executory only, *i.e.* the risk has never attached, and the assured, by formal notice to the underwriters, renounces his contract (*Lowry* v. *Bourdieu*, 1780, 2 Doug. 468, Buller, J., followed in *Tappenden* v. *Randall*, 1801, 2 Bos. & Pul. 467; 5 R. R. 662; *Aubert* v. *Walsh*, 1810, 3 Taun. 276; 12 R. R. 651; and *Palyart* v. *Leckie*, 1816, 6 M. & S. 90; 18 R. R. 381); but if the risk has begun (whether a loss has taken place or not) or has ended under an illegal policy, the premium cannot be recovered back (*André* v. *Fletcher*, 1789, 3 T. R. 266; 1 R. R. 701; *Vandyck* v. *Hewitt*, 1800, 1 East, 96; 5 R. R. 516; *Lowry* v. *Bourdieu*, above). Illegality is not excused by ignorance of law (*Monck* v. *Abel*, 1802, 3 Bos. & Pul. 35; *Lubbock* v. *Potts*, 1806, 7 East, 449), but it is by ignorance of fact (*Oom* v. *Bruce*, 1810, 12 East, 225; 11 R. R. 367; *Henry* v. *Staniforth*, 1815, 4 Camp. 270); but if the assured knows that a necessary legal condition is not complied with when the risk attaches, although he makes it good as soon as possible, he cannot recover the premium (*Cowie* v. *Barber*, 1815, 4 M. & S. 16; 16 R. R. 368).

(*b*) Where the consideration for the payment of the premium is apportionable, and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the same conditions as above, returnable to the assured (s. 83 (2) of the Bill); and such apportionment may be sanctioned by usage if not by the contract (*Stevenson* v. *Snow*, 1761, 3 Burr. 1237; *Meyer* v. *Gregory*, 1784, 3 Doug. 402; *Gale* v. *Machell*, 1784, Marsh. 524, decisions of Lord Mansfield). If, however, the risk under the contract is entire and indivisible, even though an event may happen directly after the risk begins which ends the contract, there can be no return of premium (*Tyrie* v. *Fletcher*, 1777, 2 Cowp. 665, Lord Mansfield; *Bermon* v. *Woodbridge*, 1781, 2 Doug. 781, *ibid.*); and under an "at and from" policy, if the vessel is lost in port, or if, though she has sailed thence in an unseaworthy condition, she was seaworthy there, the premium is not returnable (*Moses* v. *Pratt*, 1816, 4 Camp. 297; 16 R. R. 794; *Annen* v. *Woodman*, 1810, 3 Taun. 299; 12 R. R. 663); and if a ship deviates, as this does not vitiate the policy *ab initio*, no return of premium can be demanded for the subsequent part of the voyage (*Hogg* v. *Horner*, 1797, Par. 475; *Tait* v. *Levi*, 1811, 14 East, 481). In policies for time or at one entire premium, the risk is entire; and if a gross sum be specified as premium, it makes no difference that it is expressed in the policy to be at so much per cent. per month, for this does not make it a monthly insurance (*Lorraine* v. *Tomlinson*, 1781, 2 Doug. 585).

The following are illustrations of the two general preceding rules:— Where the policy is void or is avoided by the insurer as from the beginning of the risk (*ab initio*), the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable and has once attached, the premium is not returnable (s. 83 (3) of the Bill), *e.g.* it is returnable on breach of warranty of seaworthiness, neutrality, being in port on a certain day, or sailing with convoy (Arnould, 1109). But if the policy be avoided by the act of the assured, but not *ab initio*, *e.g.* as in deviation, and the risk is entire, there is no return of premium (*Hogg* v. *Horner*, *ante*), nor is there if the policy be avoided by the act of the assured in altering it materially after subscription without the underwriter's assent (*Langhorn* v. *Cologan*, 1812, 4 Taun. 329; 13 R. R. 613).

Where the thing insured, or part of it, has never been imperilled, the premium, or, as the case may be, a proportionate part of it, is returnable; except that under a policy "lost or not lost" (*q.v.*), where the thing insured has arrived safely when the contract is concluded, the premium is not returnable unless at that time the insurer knew of that safe arrival (s. 83 (3) (*b*) of the Bill). In the former case the return of premium is said to be made for no risk or short interest; for the underwriter would never have been liable to pay the full insurance, the risk, or all of it, not being run (Arnould, 1011). In the latter case, unless the underwriter knows of the safe arrival of the ship, the premium must be paid, or if paid is not returnable (*Bradford* v. *Symondson*, 1881, 7 Q. B. D. 456); but if he does know, his fraud avoids the policy and makes the premium returnable (*Carter* v. *Boehm*, 1766, 1 Black. W. 593); and misrepresentation by him will have the same effect (*Duffell* v. *Wilson*, 1808, 1 Camp. 401).

Where the assured has no interest throughout the currency of the risk, the premium is returnable unless the policy be a gaming or wagering one (s. 83 (*c*) of the Bill); thus it is returnable, if the want of interest be due to an innocent cause, *e.g.* mistake (*Martin* v. *Sitwell*, 1691, 1 Show. 156), or misdescription, which avoids the policy (*Robertson* v. *United I. C.*, 1801, 2 Johns. Cas. N. Y. 250, U. S.); but in a gaming or wagering policy the premium is not

recoverable (*Allkins* v. *Jupe*, below). Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable, *e.g.* captors (*Boehm* v. *Bell*, 8 T. R. 184; 4 R. R. 620). But where the risk is ended, by the ship arriving safely, it is too late then for the assured to claim a return on the ground of there having been no insurable interest (*M'Culloch* v. *Roy. Ex. A. C.*, 3 Camp. 406; 14 R. R. 765). Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable; and all the underwriters contribute rateably to such return (Marsh. 536), for they would never have been liable for more than the insurable value of the thing insured. Where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable if the several policies are all made on the same date, or, though not on the same date, yet are made before the risk attaches, for they are then equivalent to one insurance; if, however, the risk begins under the first policy as soon as it is made, or before the other policies are made, there is no return of premium in respect of the first, as it has borne the risk solely for a time, but only in respect of the latter (*Fisk* v. *Masterman*, 1841, 8 Mee. & W. 165; though by s. 83 (3) (*f*) of the Bill, in no case of over-insuring by double insurance is any part of the several premiums returnable).

(2) *Rights of Underwriter.*—The underwriter is entitled under the policy to the premium for which he undertakes the risk; for this is the consideration for the contract; and unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium (s. 52 of the Bill). In practice, policies are always effected through brokers (see BROKER (INSURANCE)); and unless otherwise agreed, where a policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer to the assured for the amount which may be payable in respect of losses or returnable premium (s. 53 (1) of the Bill). Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and assured, but not as between the insurer and the broker (s. 54 of the Bill). Whether the underwriter has actually received the premium or not, the insurer cannot sue the assured for unpaid premiums, or set off such premiums in an action by the assured against him on the policy (*Dalzell* v. *Mair*, 1808, 1 Camp. 532; *De Gaminde* v. *Pigou*, 1812, 4 Taun. 246; *Anderson* v. *Thornton*, 1853, 8 Ex. Rep. 425); and this rule extends to policies in which the assured promises to pay the premium (*Universo I. C. of Milan* v. *Merchants M. I. C.*, [1897] 1 Q. B. 205). But if fraud by the assured be proved, or collusion between him and the broker in their dealings with the underwriter, this acknowledgment is not binding (*Fry* v. *Bell*, 1811, 3 Taun. 492; 12 R. R. 691; *Mavor* v. *Simeon*, 1810, *ibid.* 497).

In addition to the premium, as already seen, the underwriter is entitled, on abandonment being made to him by the assured, to the salvage of the thing insured, and to have all the rights of the assured in regard to it.

He is also entitled to a similar right on paying for a total loss of the thing insured (s. 79 (1) of the Bill). Thus any salvage which is recovered after payment, belongs to him and not to the assured, *e.g.* any compensation made by the Government of the assured for loss by capture of his property passes to the underwriter (*Randal* v. *Cockran*, 1748, 1 Ves. 98, proceeds of Spanish ships distributed to British shipowners whose ships had been captured;

so in United States, *Gracie* v. *N. Y. F. C.*, 1811, 8 Johns. N. Y. 237); but if such compensation be made by a Government to the assured for an express object, *e.g.* supplementing the sums paid by insurers to assured not fully insured, the underwriters have no title to it, though they may have paid for total losses in respect of which that compensation is made (*Burnand* v. *Rodocanachi*, 1882, 7 App. Cas. 333, *Alabama* claims and American underwriters). Similarly, if the underwriters by their act do not take to the interest insured on which they have paid a total loss, any salvage or compensation coming to the hands of the assured can be retained by them, *e.g.* if underwriters on captured cargo compromise the claim and do not accept abandonment (*Blaaupot* v. *Da Costa*, 1750, 1 Eden, 130; *Brooks* v. *M'Donnell*, 1835, 1 Y. & C. 502). An underwriter cannot have greater rights in respect of the salvage than his assured would have had (*Simpson* v. *Thompson*, 1877, 3 App. Cas. 279); thus in case of a collision between two ships belonging to the same owner, the underwriters who have paid on one cannot claim to prove against the statutory fund of the other, for their assured could not prove against himself. If the thing insured be recovered, after payment for a total loss, the underwriter cannot reclaim the loss from the assured, but is merely entitled to the thing saved, or its value after deducting the expenses of saving it (*Da Costa* v. *Firth*, 1766, 4 Burr. 1966). There can be salvage of profits, as well as any other interest (*Mortimer* v. *Broadwood*, 1869, 20 L. T. N. S. 398; *Allkins* v. *Jupe*, 1877, 2 C. P. D. 375). The underwriter can also, though he pays for a total loss, refuse to take to the salvage insured, and incur liabilities in connection with it (see HARBOURS).

Where the insurer pays for a partial loss, the thing insured, or what remains of it, does not vest in him, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the thing insured as from the time of loss, in so far as the assured has been indemnified by such payment for the loss (s. 79 (2) of the Bill); if a fourth part of the thing insured is restored, and the underwriter has paid for three-quarters of its value in the policy, he has no right against the part restored, though the assured thereby recover more than the amount of the insurance (*Tunno* v. *Edwards*, 1810, 12 East, 488; 11 R. R. 458; *Goldsmid* v. *Gillies*, 1813, 4 Taun. 803; 14 R. R. 671). Where the assured has over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract; if any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt (s. 80 of the Bill; see *Double Insurance*, above).

(3) *Adjustment.*—When the losses due under a policy are settled, whether total or partial, the policy is said to be adjusted; and the settlement of the claims under it is called an adjustment. When the indemnity due to the assured, and the proportion thereof to be borne by each underwriter has been ascertained, in practice, by the usage at Lloyd's, the policy is endorsed, "Adjusted the loss on this policy at £ per cent.," or to a similar effect; it is then taken round to the underwriters, who initial the memorandum and strike through their subscription at the foot of the policy; and the loss is payable four or six weeks afterwards. The amount is then debited by the broker to the underwriter, the initialling of the memorandum is struck through, and the loss is then "struck off" or settled in account. As between the broker and the underwriter, the account is thereby closed; but as between the assured and the under-

writer, this "striking off" does not discharge the latter's liability under the policy, unless (*a*) he pays the amount of the loss or return of premium in money to the broker, who has the policy in his hands (*Scott* v. *Irving*, 1830, 1 Barn. & Adol. 605), or (*b*) unless the assured assents to adjustment according to Lloyd's usage (*Bartlett* v. *Pentland*, 1830, 10 Barn. & Cress. 770), or (*c*) can reasonably be presumed to have acquiesced in that method of adjustment (*Sweeting* v. *Pearce*, 1859, 9 C. B. N. S. 534; *Stewart* v. *Aberdein*, 1838, 4 Mee. & W. 211; *Gibson* v. *Winter*, 1833, 5 Barn. & Adol. 96; *Macfarlane* v. *Giannocopoulo*, 1858, 3 H. & N. 860).

The effect of an adjustment is not, however, to prevent the underwriter, who has not paid, from making any defence (although aware when he signed the adjustment of the facts on which he bases that defence) denying his liability under the policy on the ground of any misconception of law or fact (*Rogers* v. *Maylor*, 1790, *De Garron* v. *Galbraith*, 1795, Par. 194; *Herbert* v. *Champion*, 1807, 1 Camp. 134; 10 R. R. 657; *Shepherd* v. *Chewter*, 1808, *ibid.* 274; 10 R. R. 681). But actual payment, though made in ignorance of law, still, if made with full knowledge of all the circumstances, prevents the money being recovered (*Bilbie* v. *Lumley*, 1802, 2 East, 469; 6 R. R. 479; *May* v. *Christie*, 1815, Holt, 67; 17 R. R. 608, return of premium), unless fraud or mistake be proved (*Reyner* v. *Hill*, 1813, 4 Taun. 725; 14 R. R. 650; *Herbert* v. *Champion*, above), when the money is recoverable either from the assured or the broker, whichever has possession of it (*Buller* v. *Harrison*, 1777, 2 Cowp. 565; *Cox* v. *Prentice*, 1815, 3 M. & S. 344; 16 R. R. 288; *Holland* v. *Russell*, 1861, 1 B. & S. 424). Salvage losses are adjusted by the underwriters, on abandonment, paying the full insurance and then having the salvage transferred to them; but if no abandonment takes place, the underwriters generally agree for payment on account of the probable difference between the insurance and the net salvage; and if the actual difference is more, they afterwards pay the balance; while if it be less, the assured repays the excess (Arnould, 1097; *Gammon* v. *Beverley*, 1817, 1 Moore, 563; *Russell* v. *Dunskey*, 1821, 6 *ibid.* 283); and this principle may be adopted, in adjusting a partial loss, where the ship is disabled from continuing her voyage at a port of distress, and the cargo is sold there (*Hardy* v. *Innes*, 1821, 6 *ibid.* 574; 23 R. R. 630).

XV. Assignment of Policy.

A marine policy is assignable, unless it contains terms expressly prohibiting assignment (s. 50 of the Bill), both by the language of the policy itself and also by statute (1868, 31 & 32 Vict. c. 86), recognising the custom of merchants to that effect; and the fact of the underwriter not assenting to the transfer of the property insured, or the assignment of the policy, is immaterial (*Sparkes* v. *Marshall*, 1836, 2 Bing. N. C. 761); and assignment may be made either before or after loss (*ibid.*). Where a policy has been assigned so as to pass the beneficial interest in such policy to any person entitled to the subject-matter thereby insured, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected (s. 50 (2) of the Bill; 31 & 32 Vict. c. 6, ss. 1 and 2; *Lloyd* v. *Fleming*, 1872, L. R. 7 Q. B. 299); but the assignee may now, as formerly he was obliged, sue in the name of the assignor (*Gibson* v. *Winter*, 1839, Barn. & Adol. 96). The underwriter is placed in the same position as he would have had if sued by the original

assured; though if he sets up an inequitable defence, *e.g.* a release by the nominal plaintiff, the assignee may set up the true facts in reply (*De Pothonier* v. *De Mattos*, 1858, El. B. & E. 461; *Lyall* v. *Edwards*, 1861, 6 H. & N. 337); but any real defence which he has against the original assured is good against the assignee, *e.g.* payment by him to the broker in whose name the policy was made out was held to discharge the claim of the assured in respect of the same matter against him on the bankruptcy of the broker (*Gibson* v. *Winter*, above). The underwriter cannot set off a debt due to him from the assignor of the policy, for the 1868 Act does not alter the statutes of set-off, but only deals with procedure (*Pellas* v. *Neptune I. C.*, 1880, 5 C. P. D. 34).

A policy may be assigned by indorsement or in other customary manner, and a policy indorsed in blank may be assigned by delivery (s. 50 (3) of the Bill); and a policy may also be assigned as a chose in action under the general law (Judicature Act, 1873, 36 & 37 Vict. c. 73, s. 25, subs. (6)); but in that case notice of the assignment to the person liable would be necessary, which is not required by insurance law.

Where the assured has parted with or lost his interest in the subject-matter insured, and has not before or at the time of so doing expressedly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative and the policy lapses; except in the case of assignment after loss (s. 51 of the Bill). It has already been seen under *Insurable Interest*, above, that assignment of the subject-matter does not carry with it assignment of the policy; conversely, assignment of the policy conveys no right without assignment of the property. There must be both assignment of the subject-matter and assignment of the policy to pass rights under it; unless the two go together, the assignee acquires no rights under the policy.

An agreement to assign or keep alive the policy is equivalent to an assignment of it, if such can be implied or is expressed (*Delaney* v. *Stoddart*, 1785, 1 T. R. 22; 1 R. R. 139); otherwise the policy is void (*Powles* v. *Innes*, 1843, 11 Mee. & W. 10; see *North of England O. C. C.* v. *Archangel M. I. C.*, 1875, L. R. 10 Q. B. 249).

An apparent assignment of the interest, however, may not be so in reality, but only a security (*Alston* v. *Campbell*, 1779, 4 Bro. P. C. 476, bill of sale of ship; *Hibbert* v. *Carter*, 1787, 1 T. R. 745; 1 R. R. 388, pledge of bill of lading); and the assured's interest will continue.

Where a floating cargo (*i.e.* one at sea) is sold in London, it is usually sold on "London Floating Conditions," which comprise the delivery to the purchaser of any policies or cargo on the understanding that it is insured to the full value, and the price includes the cost of the insurance charges (Arnould, 117). In a sale on these conditions, including "freight and insurance to any safe port in United Kingdom, payment cash in London in exchange for shipping documents," these latter, which comprised charter-party, bill of lading, and policy for the value of cargo without the freight it would have to pay, were held sufficient (*Tamvaco* v. *Lucas*, 1862, 31 L. J. Q. B. 296).

An assured who, when selling a floating cargo insured in two policies, assigns one policy to an extent only sufficient to cover the price he has received for the cargo, though he may be entitled to the balance of the insurance money over the amount for which the policy was transferred as against the assignee (if it has been paid by the underwriter), cannot recover from the underwriter such balance, for he has no insurable interest to support his claim (*Ralli* v. *Univ. M. I. C.*, 1862, 31 L. J. Ch. 207, 313). If a policy be

assigned after loss, unless the interest in that policy has been parted with before loss, the assignment is good (Tindal, C.J., *Powles* v. *Innes*, 1843, 11 Mee. & W. 10). See generally *Insurable Interest, ante.*

[*Authorities.*—Arnould, *Marine Insurance*, 6th ed., 1887; Phillips, *ibid.*, 5th ed., 1867; Marshall, *ibid.*, 4th ed., 1861; Park, *ibid.*, 3rd ed., 1851.]

Marine Offices.—See MERCHANT SHIPPING.

Marines.—See ROYAL MARINES.

Maritagium—The right which the lord had of disposing of his infant wards in marriage. Also the portion given as a marriage portion to a daughter.

Marital Rights.—See HUSBAND AND WIFE.

Maritima Angliæ—The profit and emolument arising to the king from the sea, anciently collected by the sheriffs, and afterwards granted to the Lord High Admiral (Tomlins, *Law Dict.*). See ADMIRAL.

Maritime Courts.—See ADMIRALTY; CINQUE PORTS; LODEMANAGE; NAVAL COURTS; SHIPPING INQUIRIES; SURVEY, COURTS OF; VICE-ADMIRALTY.

Maritime Law.—Allusions to the "maritime law" or "general maritime law," are common in the decisions of Lord Mansfield and Lord Stowell, dealing with the rights and liabilities of shipowners and the merchants whose goods they carry; and Lord Mansfield speaks of maritime law being "not the law of a particular country but the general law of nations" (*Luke* v. *Lyde*, 1759, 2 Burr. 883). It seems to be a compendious expression for the whole body of principles and usages embodied in the various codes of law formulated either in very early times, as the Rhodian laws, or in mediæval and later times, such as the laws of Oleron (a Breton island), or of Wisbuy (a town in Gothland), or of the Hanse Towns, the Consolato del Mare, and the Ordonnance of Louis XIV., dealing with maritime commerce, and adopting certain common principles of law. This general maritime law is not, however, part of the law of England; for "the Admiralty Court (which administers maritime law in England) administers not that maritime law which is called the common maritime law, and is not the law of England alone, but the law of all maritime countries, but the English maritime law. This latter is not the ordinary municipal law of the country, but it is the law which the Admiralty Court, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime law. Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns are of themselves any part of the Admiralty law of England. . . . But they contain many valuable principles and statements of marine practice, which,

together with principles found in the Digest, and in the French and other ordinances, were used by the judges of the Admiralty Court when they were moulding and reducing to form the principles and practice of their Court" (Lord Esher, *The Gas Float Whitton, No.* 2, [1896] Prob. 42; *The Gaetano and Maria*, 1882, 7 P. D. 137, 143). "There is no general maritime law, as such, regulating all maritime transactions between persons of different nationalities at sea, which is not limited as administered in some Court. . . . A general maritime law can be understood in the sense of the general maritime law as administered in English Courts, that being, in truth, nothing more than English law, though dealt out in somewhat different measures in Common Law and Chancery Courts, and in the peculiar jurisdiction of the Court of Admiralty" (Willes, J., *Lloyd* v. *Guibert*, 1865, L. R. 1 Q. B. 115).

The following are some of the chief provisions of the general maritime law which are adopted in English law, viz. the principle that on the high seas the owner of a ship is liable for damage done by the negligent navigation of his ship by his servants (*The Leon*, 1881, 6 P. D. 148; *Chartered Bank of India* v. *Netherlands India S. N. C.*, 1883, 10 Q. B. D. 521); that the innocent sufferer in such a case is entitled to full compensation from all the property of the owner of the wrong-doing ship, except where this liability is now limited by statute (*The Dundee*, 1823, 1 Hag. 120; LIMITATION OF LIABILITY); that in case of collision between ships the liability is decided by the rules of navigation which usually prevail among nations navigating the sea where the collision takes place, and this is the law still applicable in the Admiralty Court where the colliding ships, or either of them, are not bound by the International Regulations (see COLLISIONS AT SEA) (*The Zollverein*, 1856, Swa. 96); that the master can hypothecate the ship and cargo where this is necessary for the safety of all concerned and for the carrying out of the ultimate object of the whole adventure (*The Gaetano and Maria*, 1882, 7 P. D. 137, 145), though the essential conditions of his exercising that power depend on the law of the flag, unless it is expressly stipulated otherwise in the contract of affreightment (*ibid.*; AFFREIGHTMENT); but if it is not shown what the provisions of the law of the flag are in this respect, then the ordinary maritime law as administered in England, *i.e.* the English law, governs the question whether the master's exercise of that power of hypothecation is valid or not (*The Hamburg*, 1864, B. & L. 253). On the other hand, the general maritime law with regard to *pro ratâ* freight is not part of our law; the former allowing it to be due if, owing to a *vis major*, the master is unable or unwilling to carry the cargo to its destination, and the merchant receives it at the port of distress; the latter only allowing it where a new contract between the master and merchant, excusing the complete carriage of the goods, is expressly made or can be inferred from their contract (Abbott, *Shipping*, 5th ed., 303, 320).

Maritime Lien.

TABLE OF CONTENTS.

(*a*) Nature and Characteristics of Maritime Lien . . . 211
(*b*) Relative Order of Maritime Liens 214
(*c*) Marshalling of Assets . . 216
(*d*) Extinguishment of Maritime Liens 216
(*e*) Transfer of Maritime Liens . 217
(*f*) Ranking of Maritime and Possessory Liens . . . 218

(*a*) *Nature and Characteristics of Maritime Lien.*—A maritime lien is a claim or privilege upon a maritime *res*, *i.e.* ship, freight, or cargo,

which may arise *ex contractu, i.e.* for services rendered to the *res*, such as salvage, or *ex delicto, i.e.* for compensation for damage by collision, and is enforced by proceeding *in rem*, or against the *res* by arrest in Admiralty (see vol. i. 331). It differs from a common law or possessory lien in that "it does not include or require possession. The word is used in maritime law not in the strict legal sense in which . . . there can be no lien without possession actual or constructive, but to express as if by analogy the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which, in either case, the right travelled with the thing into whosesoever possession it came. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment that the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whosesover possession it may come; and is inchoate from the moment the claim or privilege attaches, and, when carried into effect by a proceeding *in rem*, relates back to the period when it first attached" (Sir J. Jervis, *The Bold Buccleuch*, 1852, 7 Moo. P. C. 267, 284, 285).

The general statement that a proceeding *in rem* implies a maritime lien applies, however, only to cases where the Admiralty Court had inherent jurisdiction *in rem*, and not to cases where it was given statutory jurisdiction *in rem*. Thus although the Admiralty Court was given jurisdiction *in rem* in the case of necessaries by the Admiralty Court Acts, 1840 and 1861, there is no maritime lien for necessaries (*The Heinrich Bjorn*, 1886, 11 App. Cas. 270), for there was none before the statutes (*The Neptune*, 1835, 3 Kn. 94); and although it had jurisdiction *in rem* in the case of disbursements by a master, he had no maritime lien for them till this was given him expressly by statute (*The Sara*, 1889, 14 App. Cas. 209; M. S. A. 1894, s. 167); and, similarly, jurisdiction *in rem* in the case of claim for damages to cargo (given by Admiralty Court Act, 1861, s. 6) does not carry with it a maritime lien, and the lien given is not available against a valid charge (*e.g.* a mortgage) or a subsequent purchase of the ship (*The Piere Superiore*, 1874, L. R. 5 P. C. 482). Where, however, the subject-matter, whether collision, salvage, or wages, had in its own nature a maritime lien, it is probable that the statutory extension of the Admiralty jurisdiction (to inland waters as well as the high seas, Admiralty Court Act, 1840) to a case where the nature of the subject-matter was the same, *e.g.* collisions, etc., within the body of a county, carried with it, as inherent in the nature of the thing itself, a maritime lien, and that the Legislature did not intend to alter the incidents of the subject-matter thus submitted to a new jurisdiction (Lord Halsbury, *The Sara*, above, 216; Mellish, L.J., *The Two Ellens*, 1872, L. R. 4 P. C. 161; Bramwell, L.J., *The Heinrich Bjorn*, *ubi sup.* at p. 282).

A maritime lien arises for damage done by collision (*The Bold Buccleuch*, *ante*; *Currie* v. *M'Knight*, [1897] App. Cas. 79), salvage, wages of seamen, wages and disbursements of master, bottomry, and perhaps pilotage (*The Ripon City*, [1897] Prob. 226; *The St. Lawrence*, 1880, 5 P. D. 250; *The Adah*, 1830, 2 Hag. 326); but not for necessaries (*The Heinrich Bjorn*, *ante*), or towage (*Westrup* v. *Great Yarmouth S. C. C.*, 1889, 43 Ch. D. 241).

The basis of a maritime lien is the liability of the owner of the *res* (when

the lien attaches) to persons who have rendered services to it or received injury by it, which may or may not be a liability personally enforceable against himself. "The general principle of the maritime law is that, inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability. An exception to this rule is the case of a lien for wages of master and crew, in which the Legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and *dicta* which point in that direction; but these authorities are hardly reconcileable with the judgment of Dr. Lushington in *The Druid*, or with the law laid down by the Appeal Court in *The Parlement Belge*" (Lord Watson, *The Castlegate*, [1893] App. Cas. 38, 52; so *The Utopia*, *ibid.* 493 P. C.; see COLLISIONS AT SEA, vol. iii. 93 and 94). Thus, in the case of wages, a master has been held to have a maritime lien for wages earned under a contract which he has *bonâ fide* made with a person who has fraudulently got possession of the ship (*The Edwin*, 1864, B. & L. 281). Another exception to the general principle is the case of bottomry, which is "an instance of a claim against the *res* for which the owner gives up his personal liability" (*The Druid*, 1842, 1 Rob. W. 391, Dr. Lushington). Whether disbursements by a master fall within the rule or constitute another "exception" has recently been the subject of several decisions. In a case where it was agreed by charter-party that the charterers should provide and pay for coals, and in the course of the voyage it became necessary to get coals in order to prosecute the voyage and earn freight, and the master, knowing the terms of the charter-party, obtained coals by drawing a bill on the charterers for the value, and, on the bill being dishonoured and enforced against himself, instituted a cause of disbursements against ship and freight, it was held that the master had no authority to pledge the credit of the shipowner, and therefore had no maritime lien against the ship, or against the freight, as by the practice of Admiralty Courts a maritime lien cannot exist without a lien on ship (*The Castlegate*, [1893] App. Cas. 38, following *The Turgot*, 1886, 11 P. D. 21). Similarly, where a shipowner contracted with a coal merchant to load his ship, then in the port of London, with coal, payment to be made by bill drawn by the master on the shipowner in favour of the merchant, and the master did so, it was held that this created no maritime lien to the prejudice of prior mortgagees on the ship, such disbursement by the master not being such as to make his owners liable to the merchant without express authority from them; and it was laid down that the "disbursements by a master which are entitled to a maritime lien are those for which, by virtue of his general authority, and without express authority, the master can pledge his owner's credit, or, in other words, those which he made strictly as master—a test which probably expresses the same thing as was intended by Lord Macnaghten in *The Sara*, 'disbursements made by the master of the ship in the ordinary course of his employment'" (*The Orienta*, [1894] Prob. 276, Jeune, P.; affirmed by the Appeal Court, [1895] Prob. 49). On the other hand, in a case where a master of a ship,—appointed by persons who were not the real owners, but had contracted to buy her, and had meanwhile been allowed by the real owners to have possession and control of the ship for the purpose of using her in an ordinary way,—in pursuance of a contract between the buyers and some coal merchants, ordered coals for the ship's use in foreign ports, draw-

ing bills on the buyers for the price; and before the buyers had paid the full contract price for the ship they went bankrupt, and the real owners resumed possession of her; it was held that the master had a maritime lien for such disbursements against the ship, although the owners were not personally liable for the disbursements or the matters in respect of which the liabilities had been incurred (*The Ripon City*, [1897] Prob. 226); and although mortgagees of certain shares in the ship from the buyers are not liable to contribute to sums paid by the vendors to extinguish that maritime lien (*The Ripon City*, 1898, 67 L. J. Prob. 101).

In this latter case, Barnes, J., in a comprehensive review of the previous decisions, stated the law as to maritime lien in the following terms:—"It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist, and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the wrong The law now recognises maritime liens in certain classes of cases, the principal being bottomry, salvage, wages, master's wages, disbursements, liabilities, and damage. A maritime lien is a right acquired over a thing belonging to another, a *jus in re aliena*; and is a subtraction from the absolute property of the owner in the thing. The right must therefore have been derived from the owner either directly or through acts of persons deriving their authority from the owner. It does not follow that a right to a personal claim always co-exists with a right against the *res*. The right against the *res* may be conferred in such terms or under such conditions that a person acquiring that right obtains the security of the *res* alone, and no right against the owner personally. A simple illustration of this is the case of bottomry. The owner of a ship may find his property subjected to claims which existed prior to the date of purchase, unless the lien is lost by laches or the claim is one which is barred by the Statute of Limitations. This rule is deduced from the civil law, and though it may be hard on an innocent purchaser, if it did not exist, a person, owner at the time that the lien attached, could defeat the lien by transfer if he pleased The principle on which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her, who have allowed the owners to remain in possession, are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens may be thus expressed Persons who are allowed by those interested in a vessel to have possession of her, for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use and employment; unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such personal authority Claims like those asserted in *The Druid* and *The Orient* (see vol. iii. 94) (and, it may be added, in *The Castlegate* and *The Orienta*) cannot be enforced against the *res*, because they arise out of unlawful acts done without any authority, and beyond anything which ought to be contemplated in the ordinary use of the vessel." On the principle here enunciated, the decisions are all brought in line with each other; and maritime lien is based on services rendered to, or damage done by, the *res* in the course of its ordinary employment, for which its owner may be presumed to be liable, whether he is actually so or not.

(*b*) *Relative Order of Maritime Liens.*—The same *res* may be subject to

several maritime liens; if it is sufficient to satisfy them all, their relative importance is immaterial; but if it is not sufficient it becomes necessary to decide which of them is entitled to precedence in payment.

The general rule with regard to the order of maritime liens arising *ex contractu* is that, being in the nature of rewards for services rendered to the *res*, *i.e.* the ship, cargo, and freight, they rank against the fund out of which they are payable in their inverse order of attachment on the *res*, and the last lien in time is thus the earliest in payment, while liens *ex delicto* rank against the *res* in the order of their attachment upon it (Maclachlan, *Shipping*, 739, approved in *The Hope*, 1873, 1 Asp. 563).

Subject to this general rule, all liens *ex contractu* are equal and co-ordinate; though from their nature some liens generally obtain priority over others. Thus wages, being only earned in full at the end of the voyage, take precedence of salvage and pilotage, and also of bottomry (*The Madonna d'Idra*, 1811, 1 Dod. 40), whether earned before or after the bottomry bond (*The Sydney Cove*, 1815, 2 Dod. 13), provided they are due on the same voyage, but not if they have been earned on a previous voyage (*The Hope*, above). They also precede a subsequent, though not a former, lien of a shipwright (*The Gustaf*, 1862, Lush. 506; *The Immacolata Concezione*, 1883, 9 P. D. 37); and they, as well as seamen's subsistence money (till their return home), precede a solicitor's charge on the *res* (*The Livietta*, 1883, 8 P. D. 209, 213); but they are postponed to a subsequent salvage lien (*The Selina*, 1842, 2 N. C. 18). For who are "seamen," and accordingly entitled to a maritime lien against the ship, see SEAMAN.

Bottomry bonds give a lien which is preferred to all others except wages (*The Hersey*, 1837, 3 Hag. 404, 7 and 8); and they rank (according to the general rule above) before a prior salvage lien (*The Selina*, above), and give way to subsequent salvage, wages, and pilotage (*The Dowthorpe*, 1843, 2 Rob. W. 165), or subsequent wages and subsequent bottomry (*The Constancia*, 1845, *ibid.* 405). A master cannot assert his lien for wages or disbursements after binding himself personally by a bottomry bond, if his doing so would prejudice the bondholder (*The Jonathan Goodhue*, 1859, Swa. 524), but he can do so if this will not prejudice the bondholder (*The Edward Oliver*, 1867, L. R. 1 Ad. & Ec. 379; and *à fortiori* he can where he does not bind himself personally by the bond, but only thereby makes the ship and freight liable (*The Salacia*, 1862, Lush. 545). See BOTTOMRY. The fact of his being a part owner of the ship does not prevent his doing so under such circumstances (*The Daring*, 1868, L. R. 2 Ad. & Ec. 262).

A master's lien for wages and disbursements is postponed to the seamen's lien for wages (*The Salacia*, above; *The Sylvia Sonto*, 1893, Adm. Court, Kay, *Shipmasters and Seamen*, s. 82); and it has been postponed to a solicitor's lien for costs of defending an action against the ship by the master's (also a part owner) instructions on behalf of the shipowners (*The Heinrich*, 1872, L. R. 3 Ad. & Ec. 505); but the lien of a master (also a part owner, but not a mortgagor), for wages ranks before the claim of a mortgagee (*The Feronia*, 1867, L. R. 2 Ad. & Ec. 65), though, if he personally guarantees payment to the mortgagee, his wages are postponed to it (*The Bangor Castle*, 1896, 8 Asp. 156).

Wages, pilotage, watermen, and light dues at the port of discharge precede a bottomry bond, as also does money advanced by necessaries men at the request of the master, to pay dock dues at the port of discharge (*The St. Lawrence*, 1880, 5 P. D. 250). A solicitor's charge on the *res* ranks before a claim for necessaries (*The Soblomsten*, 1866, L. R. 1 Ad. & Ec. 293).

The lien for damage by collision, however, precedes all liens *ex contractu*

which are anterior or subsequent to it, such as wages, whether earned before or after, unless perhaps the owner is bankrupt and the crew have no other remedy (*The Benares*, 1850, 7 N. C. 50, Suppl.; *The Linda Flor*, 1857, Lush. 309; *The Duna*, 1861, 1 M. L. C. 159; *The Elin*, 1883, 8 P. D. 46 and 129), or the claim of a mortgagee or bottomry bondholder, but in the latter case the bondholder is entitled to the benefit of any increase of value made by repairs done by himself to the ship since the time of her arrest for the collision (*The Aline*, 1839, 1 Rob. W. 119). With regard to a claim for subsequent salvage in competition with a claim for damage there is no decision, but probably the salvage would rank first (Marsden, 92). A plaintiff who obtains judgment in a damage action may enforce his lien, to the exclusion of another damage claimant who institutes his action after judgment, even on the same day (*The Saracen*, 1847, 6 Moo. P. C. 56); where several claimants for damages in several actions *in rem* in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable in the order of their judgments (*ibid.*). A claimant in a second damage action, instituted before a former one is over, is entitled to damages rateably with the first claimant (*The Clara*, 1855, Lush. 6).

(*c*) *Marshalling of Assets.*—Where the holders of several liens compete with each other, the Admiralty Court has the power of marshalling the assets, so as to protect one creditor against another, and of making one creditor who can resort to two funds resort to one only which is not available to another creditor, so as to satisfy all the claims so far as possible; but the Court can only exercise this power where "it can do so without violating other rules entitled to preferential observance" (Dr. Lushington, *The Priscilla*, 1859, Lush. 1). Thus where there were three bottomry bonds, the first on the ship, the second on the cargo, and the third on the ship, the Court directed that the third and first should be satisfied out of the proceeds of the ship, and the second out of the freight, and if there was then a deficiency, out of cargo (*The Constancia*, 1845, 2 Rob. W. 405); but the cargo in a bottomry bond cannot be resorted to, whatever the form of the security may be, till ship and freight are exhausted (*The Priscilla*, above). Similarly, where a creditor has a double security, *e.g.* ship and freight belonging to different persons, the Court will protect the owners of those different interests by not allowing the creditor to elect which of the two he will proceed against, but apportioning the liability rateably between them (*ibid.*; *The Dowthorpe*, 1843, 2 Rob. W. 165). But where the proceeds of ship and freight would be exhausted by holders of a bottomry bond on ship, freight, and cargo, the Court will not marshal the assets in favour of a claim for necessaries against ship and freight, because the effect of this would be to make owners of cargo (third parties) pay the necessaries claim, with which they have no concern (*The Chioggia*, [1898] Prob. 1).

(*d*) *Extinguishment of Maritime Liens.*—A maritime lien is extinguished by payment, or by bail given in the Admiralty Court in an action to enforce it, or bail or its equivalent given in a foreign Court in an action against the *res* there, which bars an action for the same cause in England (*The Christiansborg*, 1885, 10 P. D. 141, 155; *The Rheinbeck*, 1889, 6 Asp. 366; *The Mannheim*, [1897] Prob. 13); or by a sale of the *res* by order of a competent Court, but not by a voluntary sale (*The Bold Buccleuch*, 1852, 7 Moo. P. C. 267), nor an extrajudicial sale, *e.g.* by assignees of a bankrupt shipowner in France (*The Charles Amelia*, 1868, L. R. 2 Ad. & Ec. 330). It may also be lost by delay or want of diligence on the part of the possessor of the lien, if a former claimant (*prior petens*) obtains a decree of the

Court in favour of his lien before he puts his claim in suit, which would otherwise have competed with that other lien (*The Saracen*, 1846, 2 Rob. W. 453, and 6 Moo. P. C. 56); but if the proceeds of the *res* have not left the hands of the Court, this rule only applies as between claimants *in pari conditione* (*The Markland*, 1871, L. R. 3 Ad. & Ec. 340). A holder of a lien may also lose the right to enforce it (although there is no Statute of Limitations applicable to such a case) if he delays unreasonably, or is not reasonably diligent, to do so, for "the lien is not indelible, and may be lost by negligence or delay, where the rights of third parties may be compromised; but where reasonable diligence is used and proceedings are had in good faith, the lien may be enforced into whosesoever possession the *res* may come" (Sir J. Jervis, *The Bold Buccleuch*, *ante*, 285). It has accordingly been held that a delay of four years in taking proceedings against a ship for collision will not extinguish the lien, if reasonable diligence has been used to arrest her (*The Europa*, 1863, B. & L. 89); and in a case where action was taken, eleven years after a collision, against a foreign ship, and during that interval the ship had put into British ports forty-seven times for one or more days at a time, the name and business of the company owning her were known to the plaintiffs, and there had been changes in the capital and shareholders of that foreign company, the plaintiffs were allowed to prosecute their claim, and recover their damages, with interest, from the date of the collision (*The Kong Magnus*, [1891] Prob. 223); and Sir J. Hannen there stated that "the general principle of decision in such cases was that in each case it is necessary to look to the particular circumstances, and see whether it would be inequitable after the period of time and the circumstances which may have happened (including the loss of witnesses and evidence, and change of property), to entertain a suit of this kind" (228). A master's lien for disbursements, instituted two years and a half after he had made them, and more than a year after the ship had been sold, has been held to be enforceable (*The Fairport*, 1882, 8 P. D. 48). Certain maritime liens, moreover, only exist for a short time, such as wages, the right to which is barred after six years (1705, 4 & 5 Anne, c. 3, s. 17); or bottomry bonds, which are not enforceable after the end of the voyage on which they are given; and thus an agreement between shipowner and holder of a bond on a voyage that it should not be paid till the end of a subsequent voyage, but that the lien should continue on the ship, will not preserve it (*The Royal Arch*, 1857, Swa. 269, 284).

(*e*) *Transfer of Maritime Liens.*—Maritime liens are not generally transferable; but persons advancing money to pay wages of the crew are allowed to stand in their shoes as regards priorities, if they get the leave of the Court to do so (*The Kammerherrie Rosenkrants*, 1822, 1 Hag. 62; *The Fair Haven*, 1866, L. R. 1 Ad. & Ec. 67; *The Bridgewater*, 1877, 3 Asp. 506), and even if they have not such leave (*The W. F. Safford*, 1860, Lush. 69), though in such a case they do so at their peril (*The Cornelie Henriette*, 1866, L. R. 1 Ad. & Ec. 51); and a necessaries man who has advanced money at the request of the master for payment of wages, without getting the leave of the Court to do so, has been postponed to the claim of a mortgagee, on the ground of not having a maritime lien (*The Lyons*, 1887, 6 Asp. 199). Persons who advance money to salvors do not succeed to their rights, and cannot be repaid (*The Louisa*, 1848, 3 Rob. W. 99); and seamen cannot contract themselves out of their right to salvage unless they belong to a ship which by the terms of the agreement is to be employed on salvage service, or unless by an agreement pronounced equitable by the Court (M. S. A. 1894, s. 156; *The Wilhelm Tell*, [1892] Prob. 337).

(*f*) *Ranking of Maritime and Possessory Liens.*—A maritime lien is enforced by a proceeding *in rem* (see ARREST OF SHIP), and the *res* is liable to satisfy it even though it is subject to a possessory lien, such as that of a shipwright who has her in his yard (*The Hermione*, 1841, 1 Rob. W. 178). In such a case, where maritime and possessory liens compete, the maritime liens attaching to the *res* when the possessory lien attached must be satisfied before it, *e.g.* salvage and wages and seamen's *viaticum*, or expenses of returning home, and the costs thereof, but liens accruing after the attaching of the possessory lien, such as wages and necessaries, are postponed to it (*The Gustaf*, 1862, Lush. 506; *The Immacolata Concezione*, 1883, 9 P. D. 37). Where a fund is placed in Court (*e.g.* by sale) by one set of claimants so as to be available for others, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim (*ibid.*, ship sold in a suit for necessaries). The holder of a possessory lien is entitled to priority if his work has increased the value of the *res*, to the extent of that increase, while holders of other liens are limited to its value before the work was done (*The Aline*, 1839, 1 Rob. W. 116, collision lien not enforceable against the ship as repaired by the bottomry bondholder, but only against her damaged value). To have a possessory lien, control and possession of the *res* is necessary; and thus mortgagees of a ship have been held to rank before necessaries men who, when they supplied the materials, had not control and possession of her (*The Scio*, 1867, L. R. 1 Ad. & Ec. 353); while on the other hand, if necessaries men contract to supply machinery to a steamer entered in their name at the docks of a dock company, and do so, the fact that shipwrights and other agents of the shipowner are occasionally or constantly on board does not divest them of their possessory lien on her for the price of the machinery (*Ex parte Willoughby*, 1881, 16 Ch. D. 604).

See BOTTOMRY; COLLISIONS AT SEA; SEAMAN; SHIPMASTER; SALVAGE; PILOT.

[*Authorities.*—Abbott, *Shipping*, 13th ed.; Marsden, *Collisions.*]

Maritime Territory.—Some writers on public law have used this term as a synonym of territorial waters (*q.v.*).

"If," observes Twiss, "the law of nations be held to be a portion of the law of each nation in such matters as are within its scope, then there may be no valid objection to the use of the phrase *maritime territory* in the sense of territory subject to the law of the sea, but inasmuch as the term territory in its proper sense is used to denote a district within which a nation has an absolute and exclusive right to set law, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a concurrent right to set law as its maritime territory."

He therefore proposed to confine the use of the term *maritime territory* to the actual coasts of a nation, or to those portions of sea *intra fauces terræ* over which a nation is entitled to exclusive jurisdiction, and over which its territorial law has paramount force and operation (Twiss, *Peace*, s. 180). See JURISDICTIONAL WATERS; TERRITORIAL WATERS.

Mark.—The making of a mark by a person is a sufficient signature by him, under the Statute of Frauds (*Baker* v. *Derring*, 1838, 8 Ad. & E. 94); it is also sufficient under the Wills Act, 1837 (per Creswell, J., in *Jenkins* v. *Gaisford*, 1863, 3 Sw. & Tr. 96; and *In the goods of Clarke*, 1858, 1 Sw. & Tr. 22). See also MERCHANDISE MARKS; TRADE MARKS.

Marketable Securities.—For the purpose of the charge of stamp duty thereon, marketable securities include "(*a*) a marketable security made or issued by or on behalf of any company or body of persons, corporate or unincorporate, formed or established in the United Kingdom; and (*b*) a marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after 3rd June 1862, which is made or issued in the United Kingdom, or which, though originally issued out of the United Kingdom, has been, after 6th August 1885, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and (*c*) a marketable security by or on behalf of any colonial Government, which, if the borrower were a foreign Government, would be a foreign security" (Stamp Act, 1891, s. 82). An instrument which contains a promise for value received to pay at a certain date a sum of money, and which is therefore a promissory note, must nevertheless be stamped as a "marketable security" within the above section, if on the face of the instrument there is a statement that the note is one of a series secured by the deposit of bonds to be held in trust under an agreement for the benefit of the holders of the notes, and if the instrument is dealt in, or is of such a kind as, according to the practice, to be capable of being dealt in, on the Stock Exchange (*Brown, Shipley, & Co.* v. *Inland Revenue Commissioners*, [1895] 2 Q. B. 598; see also *Chicago Railway Terminal Elevator Co.* v. *Inland Revenue Commisioners*, 1896, 75 L. T. 572; and *Baring* v. *Inland Revenue Commissioners*, [1898] 1 Q. B. 78).

Market, Court of Clerk of the—A Court "properly incident to every fair and market in the kingdom, to punish misdemeanours therein"; the chief duty of which was to see the weights and measures were according to the true standard; the functions of the Court are now superseded by the provisions of the Weights and Measures Acts (4 Steph. *Com.*, 11th ed., 308). See WEIGHTS AND MEASURES; MARKETS AND FAIRS.

Market Gardens.—Market gardens are subject to the same incidence of the law of landlord and tenant (*q.v.*) as any other lettable hereditament. The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies to market gardens (see 46 & 47 Vict. c. 61, ss. 1, 54, and 61), and therefore the tenant of a market garden is entitled to compensation for unexhausted improvements in the same way that the tenant of an agricultural holding is entitled. His right to compensation has been further extended by the Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 27). See also *King* v. *Eversfield*, [1897] 2 Q. B. 475. There is special legislation on the subject of market gardens with reference to rating. For the purposes of the general district rate, it is provided by sec. 211 (1, *b*) of the Public Health Act, 1875, that "the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, *market gardens*, or nursery grounds . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." A similar provision is contained in sec. 230 of the same Act with reference to the mode of raising contributions in a contributory place for special expenses. It is provided that with respect to special expenses, the overseers shall comply with the

requisitions of the precept of the general district council, "by raising the contribution required by the levy (in the case of an entire parish on the whole of such parish, and in the case of a contributory place or part of a contributory place forming part of a parish, by the levy on such place, or such part thereof, exclusive of the rest of the parish) of a separate rate in the same manner as if it were a rate for the relief of the poor, with this exception, viz. that . . . the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, *market gardens*, or nursery grounds . . . shall, where a special assessment is made for the purpose of such rate, be assessed in respect of one-fourth part only of the rateable value thereof, or where no special assessment is made, shall pay in respect of the said property one-fourth part only of the rate in the pound payable in respect of houses and other property." Where a market gardener and nurseryman was the occupier of a piece of land upon which were built sixteen greenhouses or glasshouses, which practically covered the surface of the land, being built on brick foundations, and used by the market gardener for the purpose of growing fruit and vegetables for sale in the course of his business, it was held by the Court of Appeal (affirming the Queen's Bench Division) that the land with the greenhouses upon it constitutes a market garden or nursery ground within the meaning of the Public Health Act, 1875, and that the property should therefore only be rated to the general district rate in the proportion of one-fourth part only of the net annual value (*Purser* v. *Worthing Local Board*, 1887, 18 Q. B. D. 818; 56 L. J. M. C. 78; 35 W. R. 682; 51 J. P. 596). The same rule would seem to apply to a fruit garden occupied for market purposes.

Under the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), where the occupier of "agricultural land" is liable to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments, the definition of the "agricultural land" is "any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one-quarter of an acre, *market gardens*, nursery grounds, orchards, or allotments . . ." Under this Act it has been held by the Court of Appeal (Lindley, M. R., and Rigby, L.J., Vaughan Williams, L.J., diss.) that where land to the extent of four acres was occupied by a market gardener and nurseryman, on which fifty-seven glasshouses or greenhouses of various sizes were erected, in which houses were grown tomatoes, cucumbers, grapes, and other vegetables and fruits, the same was not "agricultural land" within the above definition, and so liable to the reduced rate, but must be regarded as buildings liable to the full rate (*Smith* v. *Richmond*, 1898, 62 J. P. 196).

An occupier of a cottage garden, as distinct from a market garden, may claim from his landlord compensation for crops, including growing fruit, and other matters, on the determination of the tenancy, under the Allotment and Cottage Gardens Compensation for Crops Acts, 1887 (50 & 51 Vict. c. 26). The person entitled to compensation is the tenant of an allotment of not more than two acres held by him, and cultivated as a garden, or as a farm or cottage garden, cottage garden being defined as "an allotment attached to a cottage." It was held in *Cooper* v. *Pearse*, [1896] 1 Q. B. 562, that a piece of ground less than two acres in extent, cultivated by a seedsman for the purposes of his trade, is not an allotment or cottage garden, and therefore the tenant was not entitled to compensation under this Act.

By the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 1, no extraordinary charge shall be charged or levied under the Tithe

Commutation Acts on any hop ground, orchard, fruit plantation, or market garden, newly cultivated as such after the 25th June 1886. And see *Simmonds* v. *Heath*, [1894] 1 Q. B. 29; and the Tithe Amendment Act, 1860 (23 & 24 Vict. c. 93), ss. 42, 43; and article TITHES. See also LANDLORD AND TENANT; TENANT-RIGHT.

Market Overt.—Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (Sale of Goods Act, 1893, s. 22. See *Bentley* v. *Vilmont*, cited *infra*, the *Case of Market Overt*, 38 Eliz. 5 Co. 83 *b*, and 2 Black. 449, as to the common law rule). The section does not affect the law relating to the sale of HORSES, to which, practically, the rule laid down does not apply. And if the goods sold have been stolen (s. 24 (2)), upon the conviction of the thief they revest in the person who was their owner, notwithstanding the sale or any intermediate dealings with them s. 24 (1)). Meanwhile, until the conviction, the property in them passes under the sale, so that the purchaser is not liable in trover if he resells the goods, even after notice of the original owner's claim (*Horwood* v. *Smith*, 1788, 2 T. R. 750; 1 R. R. 613). He has no claim against the owner for the cost of their keep (*Walker* v. *Matthews*, 1881, 8 Q. B. D. 109). Goods obtained by false pretences are not, since the Act of 1893, revested in the defrauded owner by conviction of the thief (sec. 24 (2) partially repealing sec. 100 of the Larceny Act, 1861, and sec. 27 (3) of the Summary Jurisdiction Act, 1879, upon which *Bentley* v. *Vilmont*, 1887, 13 App. Cas. 471, was decided; see *Payne* v. *Wilson*, [1895] 1 Q. B. 653; 2 Q. B. 537).

"Market overt in the country is only held on the special (market) days provided for particular towns by charter or prescription" (*semble*, the custom does not extend to a market set up by a private Act; Chambers on *Sale*, 3rd ed., p. 54; *Moyce* v. *Newington*, 1878, 4 Q. B. D. at p. 34); "but in London every day, except Sunday, is market day. The market-place, or spot of ground set apart for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly (see next case) to sale, is market overt, for such things only as the owner professes to trade in" (Blackstone; *Case of Market Overt*, *infra*). London here means the city (see *Hargreave* v. *Spink*, [1892] 1 Q. B. 25), and a London shop is (*semble*) only market overt for sales by the shopkeeper, not for sales to him (*l.c*). It is of the essence of the custom that the sale should be an open and public sale, so a sale in a saleroom and apart from the shop (*l.c*), or at a wharf (*Wilkinson* v. *King*, 1809, 2 Camp. 335), is not within it. Nor is a sale by sample, the bulk sold not being exposed in the shop (*Crane* v. *London Dock Co.*, 1864, 33 L. J. Q. B. 224). See also HORSES.

[*Authorities.*—2 Co. *Inst.* 713; *The Case of Market Overt*, 38 Eliz. 5 Co. Rep. 83 *b*; Com. *Dig.* "Market" E., and the cases cited.]

Markets and Fairs.—A fair is a greater sort of market, usually held once or twice a year. A market is less than a fair, and is usually held once or twice a week (Bacon's *Abr.* "Fair"). Every fair is a market, but every market is not a fair (2 *Inst.* 406). Fairs and markets are derived from royal grant or prescription which presumes a grant (2 *Inst.* 406). And therefore it would seem that if any person sets up any fair or market

without the king's authority, an information in *quo warranto* lies against him (*R.* v. *Marsden*, 1766, 1 Black. W. 579).

In modern times fairs and markets are usually established by Act of Parliament. A grant of a market (under which term we shall speak also of fairs) is only made after a writ of *ad quod damnum*, and a return that the proposed market will not be to the injury of any person. But if, notwithstanding such a return, it proves to be to the damage of a market already existing, the grant may be repealed by *scire facias*, for the king has been deceived in his grant (*R.* v. *Butler*, 1603, 3 Lev. 220); as where it is so near to the old market as to injure it. Whether the new market is a nuisance to the old one is a matter of evidence (2 Saund. 174).

The lord can only hold the market on the days, and within the limits, mentioned in the grant. By Stat. North. 2 Edw. III. c. 15, the lord of a fair must at its commencement publish for what time it shall continue, and shall not hold it beyond his due time, otherwise it is seized into the king's hands. By 27 Hen. VI. c. 5, amended by 13 & 14 Vict. c. 23, a fair or market may not be held upon Sunday or Good Friday. If no place is mentioned in the grant where the market is to be held, the lord may hold it where he pleases, or rather where he can most conveniently do so (*Curwen* v. *Salkeld*, 1803, 3 East, 538; 7 R. R. 510); and if limits are assigned he may hold it anywhere within those limits; for the right of removal is incident to the grant (*R.* v. *Cotterill*, 1817, 1 Barn. & Cress. 67).

The lord has, without any words to that purpose in the grant, a right to hold a Court for the settlement of disputes which have arisen in the fair and for wrongs done therein, as battery and slander to wares. This is called the Court of Pyepowder (*pedis pulverisati*). It is a Court of record, and held before the steward of the market. The procedure of this Court is regulated by 17 Edw. IV. c. 2. It is now nearly obsolete. See INFERIOR COURTS.

Tolls.—Tolls are not incident to the franchise of common right, and cannot be levied unless expressly granted; therefore in the case of the grant of a fair by King Henry VII., *cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi ferias pertinentibus*, it was held that the grantee had no right to toll (*Heddy* v. *Wheelhouse*, 38 Eliz. Cro. (1) 558). But if some toll is granted, although the amount is not stated, the right to toll is well granted (*King* v. *Corporation of Maidenhead*, 17 Jac. I. Palm. 76); and a reasonable toll may be demanded (*Stamford* (*Corporation of*) v. *Pawlett*, 1830, 1 Cromp. & J. 57, 400). What is a reasonable toll may be difficult to determine. The grantee demands his toll at the risk of a private suit and a public prosecution if too large. But this would appear also to be the case where the amount is mentioned in the charter, for the king cannot grant an unreasonable toll; and everyone from whom toll is demanded may question its reasonableness (*ibid.*). Where tolls of a uniform amount have been taken for a great length of time, they will probably be considered reasonable, unless manifestly disproportioned to the value of the article (*Gard* v. *Callard*, 1817, 6 M. & S. 69; 18 R. R. 320). A toll of one penny for each pig sold, has been held not unreasonable (*Wright* v. *Bruister*, 1832, 4 Barn. & Adol. 116). A custom to pay a toll varying with the value of money may be presumed; and, notwithstanding the objection of rankness, a shilling for each cartload of fish, fruit, and vegetables, has been upheld (*Lawrence* v. *Hitch*, 1868, L. R. 3 Q. B. 521).

Toll is not payable until sale, unless by custom. It is payable by the buyer, and not by the seller (2 *Inst.* 221); but by custom it may be payable by the latter (*Hill* v. *Smith*, 1812, 4 Taun. 524; 10 R. R. 357). It is only payable upon goods actually brought into the market, and sold there. No

toll is payable upon goods sold by sample in the market (*Wells* v. *Miles*, 1821, 4 Barn. & Ald. 559; 23 R. R. 393); though the seller may be liable to the owner of the market in an action on the case for not bringing the goods into the market. The king cannot grant toll of things not brought into the market, and therefore such a right cannot arise by prescription (*Hill* v. *Smith*, *supra*).

Exemptions.—If the king has granted to any to be discharged of toll, either generally or specially, this grant is good to discharge him of all tolls in the king's own markets, and of the tolls which have been granted in any fair or market granted after such grant of discharge; but it cannot discharge him of tolls formerly due to owners of markets (2 *Inst.* 221). It would appear that the inhabitants of the Duchy of Lancaster are exempt from toll in all markets (*Osbuston* v. *James*, 4 Jac. II. 2 Lut. 1377); as also tenants in ancient demesne (2 *Inst.* 221).

Stallage and Piccage.—Stallage is a duty payable for the liberty of having stalls in a fair or market, or for removing them from one place to another. Piccage is a duty for picking holes in the lord's ground for the posts of stalls. These duties are sometimes called tolls, but they do not pass under that term without more. They are payable to the owner of the soil where one owns the market and another the soil upon which it is held (*Heddy* v. *Wheelhouse*, *supra*). No one can, without the licence of the owner of the market, erect a stall therein (*Mayor of Northampton* v. *Ward*, 1745, 1 Wils. 107; 2 Stra. 1238), nor set up tables for exposing his goods in the market (*Mayor of Norwich* v. *Swan*, 1777, 2 Black. W. 1116); nor may a basket, which is in effect a table, be placed upon the ground (*Mayor of Yarmouth* v. *Groom*, 1862, 1 H. & C. 102). But anyone may occupy the soil with baskets necessary and proper for exposing his goods for sale (*Townend* v. *Woodruff*, 1850, 5 Ex. Rep. 506); and may, it appears, place his goods upon the ground (*Mayor of Lawnson's* case, 30 Eliz. Cro. (1) 75).

Market Overt.—By custom, all sales of articles in open market confer upon the buyers in good faith a good title to the articles bought, whatever may have been the title of the sellers. As to this custom, see MARKET OVERT.

Disturbance.—If one has a right to a market, and another erects a market so near his that it becomes a nuisance to his market, an action on the case lies (*Yard* v. *Ford*, 22 Car. II. 2 Saund. 172), or an injunction will be granted against the continuance of the market of the defendant (*G. E. Rwy. Co.* v. *Goldsmid*, 1884, 9 App. Cas. 927); and it is no answer that the defendants do not claim to have a franchise, and take no toll (*Mosley* v. *Chadwick*, 1782, 7 Barn. & Cress. 47 *n.*). It is not the less a disturbance that the new market is held upon private ground (*G. E. Rwy. Co.* v. *Goldsmid*, 1884, *supra*). And if the defendant's market is held on a different day, yet the action lies (*Yard* v. *Ford* (*supra*)); but in that case he must prove some damage. If the new market is held upon the same day as the old one, the law intends a disturbance (*Mayor of Dorchester* v. *Ensor*, 1869, L. R. 4 Ex. 335).

But where the owner of a market allowed the defendant to erect a market in the neighbourhood, and carry it on for twenty-three years, he was held barred of his action for disturbance (*Holcroft* v. *Heel*, 1799, 1 Bos. & Pul. 400). And so where the owner used part of the space granted for a market for other purposes, and there was consequently on ordinary occasions insufficient room left for the public (*Prince* v. *Lewis*, 1826, 5 Barn. & Cress. 363).

The owner of the market has also his action against those who get the benefit of the market without paying tolls. Thus those who sell corn by

sample in the market are liable to an action for the injury done to the market by the loss of tolls (*Tewkesbury* (*Bailiff of*) v. *Bricknell*, 1809, 2 Taun. 120; 11 R. R. 537). But the action does not lie unless the act complained of was done designedly (*Mayor of Brecon* v. *Edwards*, 1862, 1 H. & C. 51). No action lies against the buyer (*Tewkesbury* (*Bailiff of*) v. *Diston*, 1805, 6 East, 438). And so where persons sell outside the market, but so near or in such a way as to get the benefit of it (*Blakey* v. *Dimsdale*, 1777, Cowp. 661; *Brigland* v. *Shapter*, 1839, 5 Mee. & W. 375). But not if they sell in their own dwelling-houses or shops (*Mayor of Macclesfield* v. *Chapman*, 1843, 12 Mee. & W. 18), unless it lies by prescription (*Mayor of Macclesfield* v. *Pedley*, 1832, 1 Nev. & M. K. B. 708).

Statutory Markets.—In modern times markets have been almost always established by local Acts of Parliament which establish and define their incidents. In order to shorten special Acts of this kind by rendering it unnecessary to repeat in each Act provisions usually inserted, and to ensure greater uniformity, the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), was passed. This Act only applies when incorporated by the special Act; but this is usually the case. It contains provisions with regard to the powers and duties of the "undertakers" in constructing and keeping open the market, erecting slaughter-houses, providing weighing machines for weighing commodities sold in the market, enforcing tolls and stallages, recovering penalties, and making by-laws for the regulation of the market. The undertakers may (s. 14) hold the market on such other days besides those prescribed (if any) as they may appoint. By sec. 13, "after the market-place is open for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings." "Prescribed limits" mean, where a municipal corporation owns the market, the boundaries of the borough (*Caswell* v. *Cooke*, 1862, 11 C. B. N. S. 637). Under this section a tradesman who brought meat into a borough, and sold it from his cart in the street to a butcher in her shop, was held liable to the penalty for "selling or exposing for sale" (*Mayor of Exeter* v. *Heaman*, 1877, 37 L. T. 535). But in the case of a baker who sold bread to customers in a similar way, except that it was in a periodical and mutual course of dealing, the penalty was held not to be incurred (*White* v. *Mayor of Yeovil*, 1892, 61 L. J. M. C. 213). Several cases have been decided as to what is included in the words "dwelling-place or shop." A large building capable of holding a hundred head of cattle, with a yard attached, and adjoining the dwelling-house of the defendant, where he held sales by auction, was held not within these words (*Fearon* v. *Mitchell*, 1872, L. R. 7 Q. B. 690). On the other hand, a modern shed affixed to the defendant's house, where he sold potatoes to customers, was held to be his "dwelling-place or shop" (*Ashworth* v. *Heyworth*, 1869, L. R. 4 Q. B. 316).

By the Metropolitan Fairs Act, 1868 (31 & 32 Vict. c. 106), when any fair is held or proposed to be held on any ground within the Metropolitan Police District other than that on which a fair has been held during each of the previous seven years, the fair may be declared illegal by a magistrate, unless the contrary is shown, and the booths may be ordered to be removed.

By the Fairs Act, 1871 (34 & 35 Vict. c. 12), the Home Secretary may, upon the representation of the magistrates of any petty sessional district, and with the consent of the owner of the fair, order the fair to be abolished. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166, an urban

authority, whether local board, improvement commissioners, or town council, may, with the consents mentioned, purchase or take on lease market rights, and provide within their district a market-place and all matters and things necessary for the use of the market, but without prejudice to the rights and privileges of persons in the district; and by sec. 169 the Markets and Fairs Clauses Act, 1847, so far as it relates to the weighing of goods and carts, and to stallages, rents, and tolls, is incorporated in this part of the Act. The words "within their district" are equivalent to the "prescribed limits" of the Markets and Fairs Clauses Act, 1847 (*Spurling* v. *Bantoft*, [1891] 2 Q. B. 384). By the Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), the provisions of the Markets and Fairs Clauses Act, 1847, with regard to the weighing of goods and carts, is extended to the weighing of cattle.

[*Authorities.*—Gunning, *Law of Tolls*; Bacon's *Abridgment*, vol. iii. tit. "Fairs"; Comyns' *Digest*, vol. v. tit. "Markets."]

Market Towns—Towns which are entitled to hold markets. See MARKETS AND FAIRS.

Market Value.—The phrase "market value" in a contract for the sale of goods means the price in the market to an ordinary consumer, irrespective of the particular contract (*Orchard* v. *Simpson*, 1857, 2 C. B. N. S. 299). See SALE OF GOODS.

Marksman—A person who signs by a mark (*q.v.*).

Marlebridge (or Marlborough), Statute of—A statute, or rather a series of statutes, passed in 1267, dealing with the subject of distress, and a number of other matters. Distraining out of a person's fee, or in the king's highway, or in the common street, except on behalf of the king, is forbidden (c. 15); and it is further provided that distresses are to be reasonable (c. 4). Practically all the other provisions have been repealed.

Marque.—See PRIVATEERING.

Marque de Fabrique—A term met with in cases involving French law, the equivalent of "trade mark," but differing from it in some essential points. Thus the French authorities will register any mark whatsoever; there is no preliminary examination; registration gives no legal right to the sole use of the mark, and no length of user of a mark can render the right to use it indefeasible. The registration only raises a presumption of priority in favour of the person registering it, and gives the rightful owner a right of action against infringers in the Correctional as distinguished from the Commercial Courts.

The following are considered *marques de fabriques*: names of a distinctive character, appellations, emblems, imprints, stamps, seals, vignettes, reliefs, letters, numbers, wrappers, and every other sign serving to dis-

tinguish the products of a manufacture or the articles of a trade (Law of June 23, 1857). See Barclay, *The Law of France relating to Industrial Property*, London, 1889.

Marriage.—The only marriage known to the law of England is Christian marriage, which has been judicially defined as "the voluntary union for life of one man and one woman to the exclusion of all others" (*Hyde* v. *Hyde*, 1866, L. R. 1 P. & D. 130). A monogamous union between persons marriageable by the law of their domicile, and validly celebrated according to the *lex loci contractus*, will be recognised as marriage in the English Courts (*Brinkley* v. *A.-G.*, 1890, 15 P. D. 76). But a union, either actually or potentially polygamous, will not be so recognised (*In re Bethell*, 1888, L. R. 38 Ch. D. 220). See FOREIGN MARRIAGE.

By the Common Law of England, which stood intact till the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), came into operation on January 1, 1858, the legal relation of husband and wife if once subsisting could only be dissolved by the death of either party. In other words, the only means of legally dissolving the relation during the lives of the parties joined was an Act of Parliament, which is still the law of IRELAND (*q.v.*), applicable to persons of Irish domicile. See *Sinclair's Divorce Bill*, [1897] App. Cas. 469 (in H. L.), following *Le Mesurier* v. *Le Mesurier*, [1895] App. Cas. 517 (in P. C.). For the history and practice of Parliamentary Divorce, see Macqueen's *House of Lords Practice*, 1842, pp. 465–668. The State originally took its law of marriage from the Church. It is sometimes said that at the Reformation a change was made—that marriage ceased to be a sacrament, and therefore became dissoluble. It is difficult to prove either the premiss or the conclusion. Whatever estimation the English reformers placed on the sacramental aspect of marriage (as to which, see Article XXV.), it is clear that no legal change was made in the direction of dissolubility. The *Reformatio Legum*, compiled under 3 & 4 Edw. VI. c. 11, which would have allowed dissolution for adultery, desertion, or cruelty, was dropped in Elizabeth's reign. Canon 107 of 1603 removed any doubt as to the Church's law. The true view of the private Divorce Acts, passed from 1669 to 1857, would seem to be that they were mere exceptional acts of sovereignty, proving by their very existence that the common law allowed no such thing as dissolution (see per Sir William Scott in *Proctor* v. *Proctor*, 1819, 2 Hag. Con. 292). A theory has been broached that, though in form legislative, these Acts were in substance judicial (see, *e.g.*, per Lord Westbury in *Shaw* v. *Gould*, 1868, L. R. 8 H. L. 55). It is hard to reconcile this theory with the facts. The Legislature was not bound by its self-imposed rules. Thus, a Standing Order of the House of Lords (1809), providing that no Bill be introduced without a clause forbidding the intermarriage of the paramours, was habitually disregarded by that House (Macqueen, p. 510). Again, the Act invariably alleged that the "guilty party" had by his or her misconduct dissolved the bond (Macqueen, p. 506). The view that adultery of itself dissolves the marriage is certainly not that of the statute law of England to-day. The adultery of the respondent is simply a cause (and in the case of the husband, by itself an insufficient cause) on which the petitioner may apply to the proper tribunal to dissolve the marriage. The Matrimonial Causes Act, 1857, took matrimonial matters from ecclesiastical cognisance, and erected a new "Court for Divorce and Matrimonial Causes," the jurisdiction of which has, as from November 1, 1875, under the Judicature Acts (see

SUPREME COURT) been transferred to the High Court of Justice, and assigned to the Probate, Divorce, and Admiralty Division. See DIVORCE; FOREIGN DIVORCE; JUDICIAL SEPARATION; NULLITY OF MARRIAGE.

The old learning as to irregular and clandestine marriages in England has been rendered practically obsolete by legislation commencing in 1753 with Lord Hardwicke's Act (26 Geo. III. c. 33), since repealed and superseded by the Marriage Act, 1823 (4 Geo. IV. c. 76). The principal authorities on the earlier law are *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. 54; *R.* v. *Millis*, 1844, 10 Cl. & Fin. 534; and *Beamish* v. *Beamish*, 1861, 9 H. L. 274. Pollock and Maitland's *History of English Law*, bk. ii. ch. 7, s. 1, and an article in the *Law Review* for May 1845 (vol. ii. p. 136), entitled "Marriage *De Jure* and *De Facto*," may also be consulted with advantage.

It would appear to have been assumed rather than established in *R.* v. *Millis* (*ubi supra*), that, since the Reformation, a deacon is competent to solemnise matrimony (see especially per Lord Lyndhurst, C., at p. 859). This view seems to be based on the further assumption that matrimony is no longer sacramental in character, and that the office is not one of benediction. On the other hand, no authority is given to a deacon to celebrate marriages by the Ordinal, nor by any post-Reformation statute or canon: and if the question were raised it may fairly be doubted whether a marriage so celebrated would be considered valid (see Blunt's *Annotated Prayer-Book*). It will be found that most text-writers who have dealt with this question depend upon a passage in Watson's *Clergyman's Law* (p. 146), who refers, as his authority, to Richard Cosin's *Tables*. Although a deacon solemnising marriage is not within the penal clause of the Act of Uniformity 13 & 14 Car. II. c. 4 (s. 14), it is by no means clear that he would not be liable to ecclesiastical censure, even if the marriage were valid by the temporal law.

For the preliminaries to marriage, see BANNS OF MARRIAGE; LICENCE (MARRIAGE); SUPERINTENDENT REGISTRAR'S CERTIFICATE.

As to fraud in relation to marriage, see *Moss* v. *Moss*, [1897] Prob. 263: and article FRAUD, vol. v. p. 498. As to RESTRAINT OF MARRIAGE, see *s.v.*

As to the solemnisation of marriage, see SOLEMNISATION OF MARRIAGE.

Marriage Articles.—See SETTLEMENTS OF PROPERTY.

Marriage Brokerage.—See BROCAGE.

Marriage, Promise of.—See BREACH OF PROMISE.

Marriage Settlement.—See SETTLEMENTS OF PROPERTY.

Married Women.—See HUSBAND AND WIFE; WOMEN.

Marshalling.—In general usage the term "to marshall" means to arrange or rank in order; in the sense in which it is used in Courts of equity, it means so to arrange different funds under administration that all

parties having equities thereon may receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of such funds (Story, *Equity Jurisprudence*, Eng. ed., s. 558). In such cases, equity applies the maxim *Nemo ex alterius detrimento fieri debet locupletior*. Accordingly, a person having two funds to satisfy his demand shall not by his election disappoint the party having only one fund (per Lord Eldon in *Aldrich* v. *Cooper*, 1803, 8 Ves. 381, 394; 7 R. R. 86).

It is essential for the application of the doctrine of marshalling between two persons, that they should both be creditors of the same person, that there should be two funds belonging to that same person in existence when the question is raised, and that one of the creditors should have the right to resort to both funds (White and Tudor, *Equity Cases*, 7th ed., 46, 47). Where the funds belong to different persons, marshalling cannot be permitted, to the prejudice of third persons (see, *e.g.*, *The Chioggia*, [1898] Prob. 1, 6).

Marshalling of Assets.

This consists in arranging the assets of a deceased person so as to give effect to the priority of debts, as to legal assets, on the one hand, and to the order of assets, on the other (Seton, *Judgments and Orders*, 5th ed., p. 1406; and see Assets).

Creditors.—Formerly, simple contract creditors had no claim upon real assets not charged with the payment of debts; and accordingly, if specialty creditors, having a right to resort to both real and personal assets, recovered out of the personal assets, simple contract creditors were entitled to stand in their place against the real assets to that extent. Such right would not, however, keep alive a demand of a simple contract creditor which would otherwise have been barred by lapse of time (*Fordham* v. *Wallis*, 1852, 10 Hare, 217). But since the Statutes 3 & 4 Will. IV. c. 184, which made freeholds and copyholds liable to simple contract debts, and 32 & 33 Vict. c. 46, by which specialty and simple contract debts were placed on an equal footing, the doctrine has ceased, as between creditors, to be of importance.

Legatees.—Where the prescribed order of application of the assets has not been followed, as where creditors having a right to resort to real estate descended go to the personal estate, the legatees may stand in their place (*Aldrich* v. *Cooper*, *ubi supra*, p. 395). Where real estate is devised, and there is no charge of debts, a pecuniary legatee is not entitled to have the assets marshalled against the devisees (*Hanby* v. *Roberts*, 1751, Amb. 127), and debts will not be thrown on the real estate in order that enough personal estate may be left for payment of legacies not charged upon it (*Keeling* v. *Brown*, 1800, 5 Ves. 359; 5 R. R. 70); the proper order having been observed, there is no marshalling. But where the real estate is charged with debts, a legatee is entitled to have the assets marshalled so as to stand in the place of creditors against the real estate to the extent to which the personal estate has been applied in payment of debts (*Foster* v. *Cook*, 3 Bro. C. C. 347; *In re Salt*, [1895] 2 Ch. 203; *In re Stokes*, 1892, 67 L. T. (N. S.) 223; and see *In re Butler*, [1894] 3 Ch. 250). A specific legatee cannot stand in the place of specialty creditors as against real estate devised (*Haslewood* v. *Pope*, 1734, 3 P. Wms 322); and where the personal estate is insufficient, a specific legatee and a devisee must contribute rateably for payment of debts (*In re Saunders-Davies*, 1887, 34 Ch. D. 482; *In re Bawden*, [1894] 1 Ch. 693). A

residuary devise was specific before the Wills Act, and so remains, notwithstanding sec. 24, and consequently a pecuniary legatee has no right to have the assets marshalled as against residuary devisees of land not charged with debts or with legacies (*Hensman* v. *Fryer*, 1867, 3 Ch. 420; *Lancefield* v. *Iggulden*, 1874, L. R. 10 Ch. 136; *In re Salt*, [1895] 2 Ch. 203; *Greville* v. *Brown*, 1859, 7 H. L. 689).

If simple contract creditors, having, under 3 & 4 Will. IV. c. 104, a right to obtain payment out of the real estate, exhaust the personalty, the legatees may stand in their place as to the real estate descended (*Tombs* v. *Rock*, 1846, 2 Col. C. C. 490, 499).

The doctrine of marshalling in favour of legatees against the heir taking descended real estate in England is part of the *lex loci rei sitæ*, and there can be no marshalling in the English Court against a Scotch heir (*Harrison* v. *Harrison*, 1873, L. R. 8 Ch. 342).

Vendor's Lien.—Before 40 & 41 Vict. c. 34, where a vendor had two funds to resort to, namely, his lien on the land and the personal estate of the deceased purchaser, pecuniary legatees were entitled to stand in his place, if he resorted to the personalty, as against the heir or a devisee (*Trimmer* v. *Bayne*, 1803, 9 Ves. 209; *Sproule* v. *Prior*, 1836, 8 Sim. 189; *Birds* v. *Askey*, 1858, 24 Beav. 618; *Lord Lilford* v. *Powys-Keck*, 1865, L. R. 1 Eq. 347). Under the Real Estate Charges Acts, 1854, 1867, and 1877, the lien must, in general, be satisfied primarily out of the land.

Where there were mortgages on real estate, primarily payable thereout under the Real Estate Charges Acts, and annuities charged by will on the real estate alone, it was held that the application of the Acts did not preclude the annuitants from their equity to marshal the assets; there being nothing in the Acts to exclude marshalling in cases where there might have been marshalling before them, subject to the necessary consequence of the new rule as to primary and secondary liability (*Buckley* v. *Buckley*, 1887, L. R. Ir. 544).

Widow's Paraphernalia.—A widow is entitled to marshal assets in all cases in which a general legatee would be so entitled (*Tipping* v. *Tipping*, 1721, 1 P. Wms. 729; *Baynton* v. *Parkhurst*, 1784, 1 Bro. C. C. 576). As to paraphernalia, see HUSBAND AND WIFE.

Legacies.—Where legacies charged on the real estate have been paid out of the personal estate, legacies not so charged will be payable to that extent out of the land charged; but the assets will not be marshalled where a legacy originally charged on land fails to affect it, as by the legatee's death before the time of payment (*Hanby* v. *Roberts*, 1751, Amb. 127; *Prowse* v. *Abingdon*, 1738, 1 Atk. 482; *Pearce* v. *Loman*, 1796, 3 Ves. 135).

Winding-up of Companies.—The "past members" of a company are not specifically liable to satisfy debts of the company contracted since they left it; yet, when they have contributed to the assets, their contributions become part of the general assets, and cannot be appropriated exclusively to the payment of the debts incurred before they retired (*Webb* v. *Whiffin*, 1872, L. R. 5 H. L. 711). There is no marshalling either of debts or of assets for the benefit either of creditors or of members (Lindley, *The Law of Companies*, 5th ed., p. 857).

Insolvent Estate or Company.—Under the former practice, a secured creditor could prove in the administration of the estate of his deceased debtor for his whole debt, and afterwards realise his security for the balance (see *Mason* v. *Bogg*, 1837, 2 Myl. & Cr. 443); and the same rule prevailed in the winding-up of a company (*Kellock's* case, 1868, L. R. 3 Ch.

769); but now the rules in bankruptcy are applicable in such cases (Judicature Act, 1875, s. 10).

Charities.—Assets were not marshalled in favour of a legacy to a charity (see *Mogg* v. *Hodges*, 1750, 2 Ves. 52), so as to leave the pure personalty for the charity; for a Court of equity would not set up an equitable rule merely to support a bequest which was contrary to law, to enable an evasion of the Mortmain Statutes. Accordingly, if a charity legacy was given out of impure and pure personalty, it abated in proportion of the first to the second; or, in the words of Lord Cottenham in the case cited below, "the rule of the Court adopted in all such cases is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund" (see *Williams* v. *Kershaw*, 1835, cited 1 Keen, 274 *n.*; 2 Seton, *Judgments and Orders*, 5th ed., p. 1130–1132). The testator, however, could himself marshal his assets by directing the charitable legacy to be paid exclusively out of the pure personalty; whether he has given any such direction is a question of construction (*Lewis* v. *Allenby*, 1870, L. R. 10 Eq. 668; *In re Ovey*, 1885, 31 Ch. D. 113; *In re Somers-Cocks*, [1895] 2 Ch. 449); and where the testator has so marshalled his assets, the charity will be entitled to stand in the place of the creditors who have exhausted the pure personalty (*A.-G.* v. *Lord Mountmorres*, 1765, 1 Dick. 379; *In re Ovey, ubi supra*).

But provisions in a will for marshalling in favour of a charity have been rendered unnecessary by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), which provides that land (see definition, s. 3) may be assured by will to or for the benefit of any charitable use, but must be sold within the period prescribed by the Act (see s. 5). The Act applies to the will made before of a testator dying after the passing of the Act (*In re Bridger*, [1894] 1 Ch. 297, C. A.).

The above rule as to non-marshalling was a purely local law, and does not prevail in Scotland (*Macdonald* v. *Macdonald*, 1872, L. R. 14 Eq. 60).

For forms of orders in case of marshalling assets, see Seton, *Judgments and Orders*, 5th ed., vol. ii. pp. 1398–1406.

Marshalling of Securities.

Where the owner of two estates or funds mortgages both to one person, and only one to a second mortgagee, the first incumbrancer must first resort to the estate or fund upon which the second has no claim (*Dolphin* v. *Aylward*, 1870, L. R. 4 H. L. 486, 505; *Lanoy* v. *Athol*, 1742, 2 Atk. 444, 446); and this right applies not only against the mortgagor, but also against volunteers claiming under him, as, *e.g.*, if the two estates have descended to different heirs, but not against third parties, as a mortgagee or purchaser of the other estate. Where there are second mortgagees of both estates, the first mortgage will be apportioned between the two properties according to their respective values (*Barnes* v. *Racster*, 1842, 1 Y. & C. C. 401: *Bugden* v. *Bignold*, 1843, 2 Y. & C. C. 377; *Gibson* v. *Seagrim*, 1855, 20 Beav. 614; *Flint* v. *Howard*, [1893] 2 Ch. 54); and the Court will not marshal against the third mortgagee, unless he took expressly subject to and after payment of the prior mortgages (*In re Mower's Trusts*, 1869, L. R. 8 Eq. 110).

For cases of marshalling in favour of volunteers, see *Hales* v. *Cox*, 1863, 32 Beav. 118; *Adridge* v. *Forbes*, 1839, 4 Jur. 20; *Anstey* v. *Newman*, 1870, 39 L. J. Ch. 769.

Where a portion is charged on one of two mortgaged estates, the mort-

gagee must first resort to the other (*Hales* v. *Cox, ubi supra; In re Saunders-Davies*, 1887, 34 Ch. D. 482); and similarly where a jointure is charged on two estates, and a portion on one only (*Lanoy* v. *Athol, ubi supra*).

Mortgagee of Personal Chattels.—Where a landlord distrained for rent on goods comprised in a bill of sale and others not so comprised, and sold part of each, the mortgagee was held entitled to stand in his place so as to have the same benefit of his security as if the goods not comprised therein had been first taken by the landlord (*Ex parte Stephenson*, 1847, De G. 586).

Surety.—For cases of marshalling as against, and in favour of, a surety, see *South* v. *Bloxam*, 1865, 2 H. & N. 457; *Heyman* v. *Dubois*, 1871, L. R. 13 Eq. 158; and see forms of the orders made, Seton, *Judgments and Orders*, 5th ed., vol. ii. pp. 1738–1740.

Married Women.—For cases affecting married women, see *Tidd* v. *Lister*, 1852, 10 Hare, 140; and *In re Loder*, 1888, 35 W. R. 58, in which case a restraint on anticipation was indirectly defeated.

Factors.—The principle is applicable in cases where a consignee has wrongfully pledged his principal's goods together with his own; and the principal may compel the pledgee to resort first to the consignee's goods (see *Ex parte Alston*, 1868, L. R. 4 Ch. 168; *Ex parte Salting*, 1883, 25 Ch. D. 148).

Life Assurance.—For cases of marshalling between the estate of the assured and the assurance society, where the policy has been mortgaged, and the assured commits suicide, see *The Solicitors and General Life Assurance Society* v. *Lamb*, 1864, 2 De G., J. & S. 251; *City Bank* v. *Sovereign Life Assurance Co.*, 1884, 50 L. T. 565.

Lien.—Where auctioneers held two funds, one subject to their lien, and the other not, and the first was also subject to a subsequent charge to a third person, it was held that they were not bound to resort to the second fund in order to enable the incumbrancer to obtain payment of his charge, the funds not standing on an equal footing. If the funds could have been resorted to under equal circumstances, marshalling would have applied (*Webb* v. *Smith*, 1885, 30 Ch. D. 192).

Admiralty.—In cases of bottomry bonds the principle of marshalling has been applied, as between the master and the bondholders (see *The Edward Oliver*, 1867, L. R. 1 Ad. & Ec. 379; *The Eugènie*, 1873, L. R. 4 Ad. & Ec. 123); but not to the prejudice of third parties (*The Chioggia*, [1898] Prob. 1). And see, *ante*, p. 216.

Crown.—The principle has been applied in cases where, in bankruptcy, the Crown, having power to resort to several properties by extent, has been confined to such as would leave the securities of incumbrancers effectual (see per Lord Eldon in *Aldrich* v. *Cooper, ubi supra*; and *Sagittary* v. *Hyde*, 1687, 1 Vern. 455).

A case for marshalling need not be made in the pleadings (*Gibbs* v. *Ougier*, 12 Ves. 413, 416; 8 R. R. 348; *Buckley* v. *Buckley*, L. R. Ir. 544, 559; and see Judicature Act, 1873, s. 24 (4)).

Since the Judicature Act, 1873, the equitable rule applies in all the Divisions of the Supreme Court (see ss. 24 (4), 25 (4) (11)).

For forms of orders in cases of marshalling securities, see Seton, *Judgments and Orders*, 5th ed., vol. ii. pp. 1738–1741.

Marshal of Queen's Bench.—This was the officer who had the custody of the Queen's Bench Prison. On the establishment of the Queen's Prison a marshal or keeper of that prison was appointed,

and the office of marshal of the Queen's Bench was abolished (see QUEEN'S PRISON; MARSHALSEA, COURT OF).

Marshalsea, Court of.—The Court of the Marshalsea was a Court of record held before the steward and marshal of the royal household, and had original jurisdiction within the verge, *i.e.* a circuit of twelve miles round the palace where the sovereign was actually resident. The jurisdiction was both civil and criminal, but did not extend to pleas of freehold or trespasses not done *vi et armis*.

The chief authority on the Court is the case of the *Marshalsea*, 1613, 10 Co. Rep. 68 *b*. It was distinct from the Court of the High Steward (see 33 Hen. VIII. c. 12), and its civil jurisdiction was abolished in 1849 (12 & 13 Vict. c. 101, ss. 13, 14).

See BOARD OF GREEN CLOTH; PALACE COURT.

[*Authority.*—Com. *Dig.* tit. "Courts" (F).]

Marshalsea Prison—The name applied to two district prisons—(1) that of the Marshalsea of the Royal Household, used for debtors and persons charged with contempt of the Marshalsea Court, the Palace Court, and the High Court of Admiralty, and for Admiralty prisoners under sentence of court-martial and for offences on the high seas.

(2) That of the Marshalsea of the Court of Queen's Bench, used for debtors and persons confined under the sentence or charged with contempt of that Court.

The first was in High Street, Southwark, and was there established at least as early as Edward III. The second was established in 1835 (5 & 6 Will. IV. c. 22) in the Borough Road, Southwark. The first was abolished in 1842 and the prisoners transferred to the Queen's Bench Prison, the short name for the second (5 & 6 Vict. c. 42, ss. 1–7; 11 & 12 Vict. c. 7). The Queen's Bench Prison was abolished in 1862, and Whitecross Street Prison substituted (25 & 26 Vict. c. 104, s. 2), and Whitecross Street was abolished and Holloway Prison substituted in 1870 (under 25 & 26 Vict. c. 104, s. 12). The various enactments provided for the legality of custody in the substituted prison, and a Home Office order of 1889 (St. R. & O., Revised, vol. v. p. 657) makes Holloway a prison for debtors and non-criminal prisoners.

[*Authorities.*—Wheatly and Cunningham, *London Past and Present*; Com. *Dig.* "Imprisonment" (C).]

Martial Law.—Martial law originally meant the law administered in the Court of the Earl Marshal (*q.v.*) by the constable and marshal, over troops in actual service, whether in the realm or without; and accordingly it used to be written "marshal law," and we retain the form in judge-marshal and provost-marshal; but in courts-martial and martial law the changed form is in use. Marshal law then was what is now known as military law. The law which had thus been used for the government of armies in the field was frequently made use of by sovereigns before Charles I., and by that king to punish subjects in rebellion. Commissions were issued, as is recited in the Petition of Right (3 Chas. I. c. 1), to certain persons to proceed in particular cases "according to the justice of martial law," and thereby persons had been put to death who, if deserving death, ought to have been tried in the ordinary way, while others, pleading privilege, had

escaped. Such commissions were declared to be wholly and directly contrary to the laws and statutes of the realm; and accordingly it was provided that no such commission should in future be issued. This suspension of the ordinary law of the land, and the temporary government of a country, or portions of it, by military tribunals, is the second and proper meaning of the term martial law. It is in this sense that most writers on the constitution and the army speak of martial law as being unknown to English jurisprudence, and as having no place in the institutions of the country.

Military law providing for the discipline of the army (*q.v.*) is sometimes called martial law, and that of course takes its place in the institutions of the country. So also martial law is used as a compendious term for the common law right of the Crown and its representatives, to repel force by force, in the case of invasion, insurrection, or riot, and to act against rebels as if they were foreign invaders, in order to put down the disturbances; although the parties afterwards must be tried by the ordinary Courts, and all officers who may have used excessive and unnecessary force may be liable themselves to be called to answer for their acts.

But the truly distinctive use of the term "martial law" is the suspension of the ordinary law and its substitution by the law of military tribunals set over all the population of a district, and no provision is made for that in the English constitution, which is called the "state of siege" on the continent of Europe, where the civil law is suspended for the time being, or made subordinate to the military, and the place or district is put under the authority of the military power. Yet it is in similar circumstances to those in which the state of siege is proclaimed that the English proclamations of martial law, as they are called, have from time to time taken place in our history. Whatever may be the true meaning of this, and whatever the legal effect, it is certain that it has been left without specific definition, and it is not regulated by known limitations as is the case in the countries just mentioned.

That there shall not be substituted military tribunals for the punishment of rebels or rioters after the suppression of disturbances by the military, is quite clear. When peace has become established, all wrong-doers must be handed over to the civil power, since it is illegal to resort to martial law as a special mode of punishing rebellion. On the other hand, whatever powers may be necessary for suppressing the rebellion and restoring order, whatever physical force is required to be used for that purpose, even to the destruction of life and property to any extent, may be justified by the military authorities. But this does not imply that wanton and excessive means beyond those absolutely necessary are justifiable. If such are used, the military are responsible, both civilly and criminally, as if there had been no proclamation of martial law, and like other citizens. But it seems clear also that amongst the methods employed for suppressing a rebellion, as distinct from punishment after the rising has been put down, and the ordinary Courts of justice are available, is that of holding inquiries and inflicting such punishment as may be necessary to attain the sole object the military has in view, viz. the suppression of the disturbances and establishment of the ordinary course of things.

The late Sir James Fitz-James Stephen, in his *History of the Criminal Law*, vol. i. p. 217, speaking of the military courts held for such a purpose, points out that they are not courts-martial properly speaking, but committees for deciding on the exercise of the discretionary power of the military. The officers are not administering a law but doing acts which must be supposed to be necessary for suppressing the rebellion; and the

holding of the inquiry is a means of showing that they are acting in good faith. They are not protected as if they were performing judicial acts on courts-martial, properly so called, under the Army Act; and they remain personally liable if they take any proceedings through such a Court or committee in excess of what is necessary for suppressing the rebellion. The distinction between such a Court and one held after the restoration of peace is exemplified by the case of *Wolfe Tone* (27 St. Tri. 614), who, having taken part in 1798 in a French invasion in aid of rebellion in Ireland, was captured when the French surrendered, and therefore after the suppression of the rebellion was accomplished. A court-martial sentenced him to death, but the Court of King's Bench caused him to be released on a *habeas corpus*.

Something more than this is claimed by those writers who assert that the proclamation of martial law is the assertion of some prerogative power of the Crown distinct from its common law right of calling upon all citizens to assist, by the use of necessary physical force, in suppressing rebellion. Within the realm it is admitted that the Petition of Right forbids the issuing of commissions for holding tribunals to punish by court-martial after the rebellion is suppressed; but it is affirmed that, except to this extent, the prerogative exists, both within the realm and in the dominions outside the realm of England, as it did before in the case of war and of rebellion. Lord Blackburn in his charge to the grand jury in the case of *R* v. *Eyre*, 1867 (Finlason's Report, pp. 70, 71), puts this claim on behalf of the Crown thus: "That whilst the insurrection existed, pending the insurrection, and for a short time afterwards, the Crown had, and *de facto* exercised, the power to proclaim martial law, in the sense of using summary proceedings to punish the insurgents, and to check and stop the spread of the rebellion by summary proceedings against the insurgents, so as, to adopt a modern phrase, 'to stamp out the rebellion.'" Upon this he observed: "Now no doubt the extent to which the Crown had power to do that has never yet been decided. It has never come to be decided what this precise power is." Nothing has occurred since then to settle the law more definitely; and the best opinion seems to be that martial law, as it is known in England, is only another name for the common law duty incumbent on all citizens to put down rebellion by all possible means.

It is to be noted that the proclamations of martial law which have been made in the 18th century, and within the present century, do not proceed upon this asserted prerogative power, and do not assume to set up the "state of siege," but merely justify the use of arms against rebels; and after the suppression of the insurrection Acts of Indemnity have always been passed for the purpose of indemnifying those responsible for carrying out repressive measures, unless they can be shown to have acted maliciously and oppressively, in excess of the requirements of the position. In a despatch published in Clode, *Military Forces of the Crown*, vol. ii. p. 511, in respect of an Indemnity Act passed by the Legislature of St. Vincent in 1862, it is said: "The first clause declares the proclamation of martial law to have 'been *lawfully issued*'; but this is not the fact, and ought not to have been so declared. In proclaiming martial law the executive authority in fact declares itself obliged, for the protection of the community, to neglect law, trusting to the Legislature to relieve all who, in obedience to the constituted authority, may have acted in defence of the public safety, from the consequences of having acted unlawfully. The proclamation was right and necessary, but it was not strictly lawful."

See ARMY; COURTS-MARTIAL.

[*Authorities.*—Stephen, *History of Military Law*, *supra*; Dicey, *Law of*

the Constitution, 5th ed., pp. 266–276; Clode, *Military Forces of the Crown*, vol. ii. ch. xvii., and *Military and Martial Law*, pp. 156–169; Halleck, *International Law*, vol. i. p. 499; Simmons on *Courts-Martial*, 6th ed., p. 16; Finlason's Report of *R.* v. *Eyre*, *supra*, and *Martial Law*, and *Commentaries on Martial Law*.]

Masculine.—In the Interpretation Act, 1889 (52 & 53 Vict. c. 63), and in every Act passed after the year 1850, whether before or after the commencement of the Act of 1889 (viz. 1st January 1890), unless the contrary intention appears, words importing the masculine gender are to include females (1889, c. 63, s. 1 (1) (*a*)). The same rule is to be observed in the construction of every enactment contained in an Act passed in or before the year 1850 relating to an offence punishable on indictment (*ibid.* s. 1 (2)).

Master and Deputy-Master of the Mint.—The Master of the Mint was the title given to the chief officer who had the charge of the coinage under the regulations instituted by Edward II. in 1325, which have formed the basis of all subsequent reorganisations of the Mint (*q.v.*). A Deputy Mint Master was associated with him later, and this continued down to 1870; these officials usually being selected for their scientific knowledge; and they were each salaried. But in that year, by the Coinage Act, 1870 (33 Vict. c. 10), s. 14, it was provided that the Chancellor of the Exchequer for the time being should be the master, worker, and warden of Her Majesty's Royal Mint in England. The actual administration was thus left in the hands of the Deputy-Master; all duties, powers, and authorities imposed on, or vested in, or transacted before the Master of the Mint being made exercisable by his deputy. By accepting this office, the Chancellor of the Exchequer is not to be incapable of being elected to, or of sitting or voting in, the House of Commons; a reminiscence of the time when the coinage was in the hands of private contractors.

The appointment of deputy-masters and other officers and persons for the purpose of carrying on the business of the Mint, is made by the Treasury; and the Master of the Mint may from time to time promote, suspend, and remove any such deputy-masters and officers.

See ASSAY; MINT.

[*Authorities.*—Anson, *Law and Custom of the Constitution*, 2nd ed., vol. ii. p. 181; *Encycl. Brit.*, article "Mint."]

Master and Servant.

TABLE OF CONTENTS.

THE RELATION OF MASTER AND SERVANT 236
Nature of the Relation . . . 236
Meaning of "Master" and "Servant" 237
Classes of Servants 238
Legislation as to Master and Servant 238
THE CONTRACT OF HIRING AND SERVICE 239
Parties 239
Form 240
Stamp 241
Excise Duty on Male Servants . 241
Consideration 241
Specific Performance 242
Injunction to restrain Breach of Contract 243
RIGHTS AND DUTIES OF MASTER AND SERVANT *inter se* 243
General 243
Duration of the Contract of Service 245

Disputes between Master and Servant as to Wages, etc. . . 245
Master's Liability for Injury to Servant 246

SERVANT'S CHARACTER . . . 247
Statements as to, privileged . . 247
Action for Defamation of . . 248
Action by Master for Damage from False Character . . 248
Criminal Proceedings in respect of False Character . . . 249

WRONGFUL ACTS OF THIRD PARTIES AFFECTING THE CONTRACT OF SERVICE 249
Enticing away Servant . . 250
Seduction of Servant . . . 250
Injury causing Death of Servant . 251

MASTER'S LIABILITY TO THIRD PARTIES FOR ACTS OF SERVANT . 251
Master's Liability for Contracts of Servant 251
Master's Liability for Torts of Servant 251
Master's Liability for Criminal Acts of Servant . . . 256

SERVANT'S LIABILITY TO THIRD PARTIES 258
Servant's Liability on Contracts 258
Servant's Liability for Torts . 258

CRIMES BY SERVANT . . . 259
Larceny by a Servant . . . 259
Embezzlement 259
Misappropriation of Master's Corn, etc. 259
Criminal Breaches of Contract of Service 260

TERMINATION OF THE CONTRACT OF HIRING AND SERVICE . . . 260
General Grounds for Dissolution 260
Termination by Consent . . 260
Death 261
Dissolution of Partnership, etc. 261
Breach of Contract before Time for Performance 262
Additional Risk 262
Notice 262
Dismissal without Notice . . 263
Action for Wrongful Dismissal . 265

THE RELATION OF MASTER AND SERVANT.—*Nature of the Relation.*—The relation of master and servant, in modern times at least, is purely contractual, except in so far as rights and duties are created and imposed by statute; with this exception the rights and duties of the master towards his servant, and of the servant towards his master, are grounded entirely on contract. This fact affords an illustration of the doctrine that the movement of progressive societies has hitherto been a movement from status to contract (see Sir Henry Maine, *Ancient Law*, 12th ed., 1888, ch. v. p. 170). The institutions of slavery, serfdom, or villeinage, which characterise the systems of the ancient world, have disappeared, or at any-rate are unknown to modern communities in a more developed state of civilisation, and have given place to the contractual relation of master and servant.

In speaking of the relation of master and servant, Blackstone, with characteristic vagueness, affirms that it is founded in convenience, whereby a man is directed to call in the assistance of others where his own skill and labour will not be sufficient to answer the cares incumbent upon him (see Black. *Com.* bk. i. ch. xiv.). This appears to be merely another way of stating that individuals are impelled by convenience to enter into contract, which is the basis of the relation of master and servant.

The relations between bailor and bailee, principal and factor or broker, solicitor and client, and many other contractual relations, are distinguishable from the relation of master and servant established by the contract of hiring and service.

It is, however, to be noted that the provisions of particular statutes may, for the purpose of creating a duty to the public, create a relation which is analogous to that of master and servant. For instance, it has been decided by the Court of Appeal that under the London Hackney Carriages Act, 1843, 6 & 7 Vict. c. 86, so far as the public is concerned, the registered proprietor of a hackney carriage is under a responsibility for the acts of the driver whilst he is plying for hire, as if the relation of master and

servant existed between them, even though in fact it does not exist (see *Keen* v. *Henry*, [1894] 1 Q. B. 292; *King* v. *London Improved Cab Co.*, 1889, 23 Q. B. D. 281; see, however, as to the construction of the relation created by the Locomotives Act, 1865, 28 & 29 Vict. c. 83, *Smith* v. *Bailey*, [1891] 2 Q. B. 403).

But, as a general rule, where the relation of master and servant, or of principal and agent, does not exist, an individual is under no liability for the acts or defaults of another. So where an action was brought against General Booth, as head of the Salvation Army, by the plaintiffs to recover damages for an injury to their horse, which was caused by another horse which became restive owing to the band of a detachment of the Salvation Army playing in a public street, it was held that there being no evidence to show what the relationship was between the particular members of the Salvation Army, whose acts had been the cause of the injury, and the defendant, it could not be inferred that they were his servants or were acting under his authority (*The London General Omnibus Co.* v. *Booth*, 1894, 63 L. J. Q. B. 244).

Meaning of "Master" and "Servant."—There appears to be no comprehensive definition of the terms "master" and "servant"; the numerous judicial utterances on the subject are concerned only with particular classes of servants, or with the ascertainment of the meaning of the terms as used in various statutes or for particular purposes.

The term "servant" has, for example, received very different constructions under the Carriers Act, 1830, 11 Geo. IV. and 1 Will. IV. c. 68 (see *Machu* v. *The London and South-Western Rwy. Co.*, 1848, 2 Ex. 415; *Stephens* v. *London and South-Western Rwy. Co.*, 1886, 18 Q. B. D. 121); the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31 (see *Doolan* v. *The Directors, etc., of the Midland Rwy. Co.*, 1877, 2 App. Cas. 792); the Customs and Inland Revenue Acts (see *Yewens* v. *Noakes*, 1880, 6 Q. B. D. 530; *Rolfe* v. *Hyde & Co.*, 1881, *ibid.* 673; *Wequellin* v. *Wayall*, 1885, 14 Q. B. D. 838; *London Library* v. *Carter*, 1890, 6 T. R. 161; see also the interpretation of the term "servant or other person" as regards exemption from inhabited house duty in the Customs and Inland Revenue Act, 1881, 44 & 45 Vict. c. 12, s. 24); and the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 68 (see *R.* v. *Tite*, 1861, L. & C. 29; *M'Donald's* case, 1861, *ibid.* 85; *R.* v. *Bowers*, 1866, L. R. 1 C. C. R. 41; *R.* v. *Tyree*, 1869, *ibid.* 177; *R.* v. *Negus*, 1873, L. R. 2 C. C. R. 34; *R.* v. *Foulkes*, 1875, *ibid.* 152; *R.* v. *Harris*, 1893, 17 Cox C. C. 656; *R.* v. *Stuart*, [1894] 1 Q. B. 310).

With regard to the offence of embezzlement by clerks or servants under sec. 68 of the Larceny Act, 1861, Sir James Stephen defines a clerk or servant as a person bound either by an express contract of service, or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact (*Digest of Criminal Law*, 5th ed., 1894, art. 335; see also *R.* v. *Negus*, 1873, L. R. 2 C. C. R. 34).

The power of controlling the work, which is involved in the obligation to obey orders when communicated, has been suggested as the legal criterion of the relation of master and servant (see per Crompton, J., *Sadler* v. *Henlock*, 1855, 4 El. & Bl. at p. 578; see also Pollock on *Torts*, 4th ed., 1895, pp. 72–76).

Many tests have, indeed, been suggested for ascertaining the existence of the relation, but none of them appear to be sufficiently wide to embrace all classes of cases so as to be applicable to all persons who for

various purposes are included within the category of servants. In connection with the action for seduction, for example, the word "servant" is, in many cases, used in an anomalous and fictitious sense.

The following definition of the terms "master" and "servant" has been suggested:—A servant is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done; a master is the person who is legally entitled to give such orders and to have them obeyed (Eversley on *Domestic Relations*, 1885, p. 907).

But it is, in fact, scarcely possible to frame any definition of the term "servant" that can be absolutely exhaustive, owing to the varying significations which are attached to the word in its many applications, and to the divergent senses in which it is used for different purposes in various Acts of Parliament.

As to the way in which the word "servants" has been construed in the case of legacies to servants, see WILL.

Classes of Servants.—Servants may be roughly classified as (1) menial servants, including domestic servants; (2) persons employed in non-domestic occupations, such as clerks and persons engaged in offices, shops, factories, and other business occupations, labourers, artisans, and other workmen, etc.; and (3) apprentices. The law relating to apprentices is discussed under the head APPRENTICE; see also APPRENTICES (SEA).

"Every servant," says a modern writer, "who at all times during the period of his service is under the immediate control, discipline, and management of his master, and is also liable to attend his person, falls within the category of menial; whereas domestic servants are those who form part only of the family household of their employer" (Eversley on *Domestic Relations*, 1885, p. 910). A menial servant is a subordinate domestic servant, generally, though not always, an indoor servant, whose service brings him into close proximity to his master, thus rendering it to the interest of both master and servant that the contract should be determinable before the end of the year of service (see per Erle, C.J., *Nicoll* v. *Greaves*, 1864, 33 L. J. C. P. at p. 261).

It has, for example, been held that a huntsman is a menial servant, and, therefore, the hiring of a huntsman, though in terms for a year, is subject to the ordinary condition that it may be determined by either party at a month's notice (*Nicoll* v. *Greaves*, 1864, *ibid.* 259); so also is a head gardener, though engaged on an agreement that he should have yearly wages and a house to live in rent free (*Nowlan* v. *Ablett*, 1835, 2 C. M. & R. 54); and a general handy man, though partly paid by perquisites (*Johnson* v. *Blenkinsopp*, 1841, 5 Jur. 870). On the other hand, a governess (*Todd* v. *Kellage*, 1852, 22 L. J. Ex. 1), a housekeeper at a large hotel (*Lawler* v. *Linden*, 1876, 10 Ir. R. C. L. 188), and a steward (*Forgan* v. *Burke*, 1861, 12 Ir. R. C. L. 495), are not within the category of menial servants, and are not, therefore, in the absence of express agreement, liable to be discharged at a month's notice. Each case must, however, be determined by the particular facts; and no definitive rule as to who are menial or domestic servants can be formulated.

Legislation as to Master and Servant.—In addition to, and in some cases in substitution for, the common law principles as to the relation of master and servant, the reciprocal rights and duties of masters and servants, and of

employers and workmen in various trades and employments, are regulated by the provisions of numerous statutes, among the more important of which may be enumerated the following:—

The Frauds by Workmen Act, 1748, 22 Geo. II. c. 27.
The Frauds by Workmen Act, 1777, 17 Geo. III. c. 56.
The Servants' Characters Act, 1792, 32 Geo. III. c. 56.
The Truck Act, 1831 to 1896.
The Master and Workmen (Arbitration) Act, 1837, 7 Will. IV. and 1 Vict. c. 67.
The Silk Weavers Act, 1845, 8 & 9 Vict. c. 128.
The Poor Law (Apprentices, etc.) Act, 1851, 14 & 15 Vict. c. 11.
The Misappropriation by Servants Act, 1863, 26 & 27 Vict. c. 103.
The Wages Attachment Abolition Act, 1870, 33 & 34 Vict. c. 30.
The Trade Union Act, 1871, 34 & 35 Vict. c. 31.
The Hosiery Manufacture (Wages) Act, 1874, 37 & 38 Vict. c. 48.
The Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86.
The Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90.
The Factory and Workshop Acts, 1878 to 1895.
The Merchant Seamen (Payment of Wages and Rating) Act, 1880, 43 & 44 Vict. c. 16.
The Employers Liability Act, 1880, 43 & 44 Vict. c. 42.
The Payment of Wages in Public-houses Prohibition Act, 1883, 46 & 47 Vict. c. 31.
The Coal Mines Regulation Acts, 1887 to 1896.
The Shop Hours Acts, 1892 to 1895.
The Cotton Cloth Factories Acts, 1889 and 1897.
The Notice of Accidents Act, 1894, 57 & 58 Vict. c. 28.
The Conciliation Act, 1896, 59 & 60 Vict. c. 30.
The Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37.

As to the effect of these enactments, so far as they are beyond the scope of the present article, see the articles—APPRENTICE; APPRENTICES (SEA); COAL MINES; COMBINATIONS; CONCILIATION; CONSPIRACY; COTTON CLOTH FACTORIES; DANGEROUS GOODS; DANGEROUS MACHINERY; DANGEROUS PERFORMANCE; EMPLOYERS' AND WORKMEN; EMPLOYERS LIABILITY; FACTORIES AND WORKSHOPS; MINES AND MINERALS; SHOP HOURS; TRADE UNION; TRUCK ACTS; etc. See also Chitty's *Statutes*, 5th ed., vol. vii. title "Master and Servant."

Several old statutes relating to the law of master and servant in particular manufactures having, partly by reason of changes in the methods of manufacture and in the conditions of employment, and partly by reason of improvements in the general law, either ceased to be put in force or become unnecessary, were expressly and specifically repealed by the Master and Servant Act, 1889, 52 & 53 Vict. c. 24.

THE CONTRACT OF HIRING AND SERVICE.—*Parties.*—As a general rule, it may be said that every person of full age is competent to be a party to a contract of hiring and service either in the capacity of master or servant. Moreover, an infant can enter into such a contract, though it will be voidable on his part unless the contract is beneficial to himself (see *Wood* v. *Fenwick*, 1842, 10 Mee. & W. 195; *R.* v. *Lord*, 1848, 12 Q. B. 757). But a contract, which on the whole is for the benefit of an infant, will be binding on him (see *Clements* v. *London and North-Western Rwy. Co.*, [1894] 2 Q. B. 482).

In the case of a partnership, each of the partners has an implied authority to engage servants for the partnership business, and the firm will consequently be bound by a contract of hiring and service entered into by one of its members (see *Beckham* v. *Drake and Others*, 1841, 9 Mee. & W. 79; see also Lindley on *Partnership*, 6th ed., 1893, p. 157).

The capacity of infants, lunatics, and insane persons, married women, and corporations, to enter into a contract of hiring and service is coextensive with their ordinary contractual capacity, and as such forms part of the general law of contract (see the article CONTRACT; see also COMPANY; CORPORATION; HUSBAND AND WIFE; LUNACY; INFANTS; PRINCIPAL AND AGENT).

A contract for hiring and service cannot subsist between counsel and client, a barrister having no right of action for his fees (see *Kennedy* v. *Brown*, 1863, 32 L. J. C. P. 137).

Form.—The contract creating the relation of master and servant may be express or implied from the conduct of the parties. In accordance with the ordinary principles of the law of contract, no special form is, as a rule, requisite to the validity of a contract of hiring and service. An important exception to this rule is engrafted by sec. 4 of the Statute of Frauds, which requires any contract which cannot be performed within one year to be evidenced by a written memorandum signed by the parties to be charged or their agents (see the article FRAUDS, STATUTE OF). A contract of hiring and service which from its terms is incapable of being completely performed within one year cannot, therefore, be legally enforced unless it be reduced to writing (see *Bracegirdle* v. *Heald*, 1818, 1 Barn. & Ald. 722; *Dobson* v. *Collis*, 1856, 25 L. J. Ex. 267; *Davey* v. *Shannon*, 1879, 48 L. J. Ex. 459). But a contract of service which can be performed by one of the parties within the year need not be in writing (*Ching* v. *Hemming*, 1849, 4 Ex. 531; see also *Touch* v. *Strawbridge*, 1846, 15 L. J. C. P. 170). As to the incorporation of workshop rules as part of the contract, see *Carus* v. *Eastwood*, 1875, 32 L. T. 855; and as to a contract of service contained in several documents, see *Jones* v. *Victoria Graving Dock Co.*, 1877, 46 L. J. Q. B. 219. See generally as to what is a sufficient memorandum in writing to satisfy the statute, FRAUDS, STATUTE OF.

Another exception is furnished by the common law rule that the contracts of corporations must be under seal.

A contract for the hire of a servant by a corporation must generally be under its corporate seal. Thus where a person is engaged by a corporation to act as solicitor (*Arnold* v. *The Mayor of Poole*, 1842, 4 Man. & G. 860), rate-collector (*Smart* v. *West Ham Union*, 1856, 25 L. J. Ex. 210), medical officer (*Dyte* v. *St. Pancras Guardians*, 1863, 27 L. T. 342), clerk to master of workhouse (*Austin* v. *Bethnal Green*, 1874, 43 L. J. C. P. 100), in the absence of a contract under seal there is no binding contract, so that the persons so engaged are unable to recover their fees, salary, or wages. But in matters of daily occurrence or of trifling importance, such as the employment of inferior servants, a parol contract would bind the corporation (see *Mayor, etc., of Ludlow* v. *Charlton*, 1840, 6 Mee. & W. at p. 822; *Smith* v. *Cartwright*, 1851, 6 Ex. 927; *Nicholson* v. *The Guardians of Bradfield Union*, 1866, 35 L. J. Q. B. 176), and contracts within the ordinary course of business of a trading company need not be under seal (see *South of Ireland Colliery Co.* v. *Waddle*, 1869, L. R. 4 C. P. 616). As to contracts by registered companies, see the Companies Act, 1867, 30 & 31 Vict. c. 131, s. 37. As to contracts by urban sanitary authorities, see the Public Health

Act, 1875, 38 & 39 Vict. c. 55, s. 174 (1); see also *Young* v. *The Mayor, etc., of Leamington*, 1883, 8 App. Cas. (H. L.) 517.

Agreements by the master of a ship for the engagement of seamen (except in the case of ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coast of the United Kingdom) must be in a form approved by the Board of Trade, and comply with the requirements of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60 (see MERCHANT SHIPPING).

Stamp.—An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant, is expressly exempted from stamp duty, as also is an agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom (see the Stamp Act, 1891, 54 & 55 Vict. c. 39, Sched. I). An agreement for the hire of a clerk is not within this exception (see *Dakin* v. *Watson*, 1841, 2 Craw. & D. 224). See further as to stamps on contracts of hiring and service, Alpe, *Law of Stamp Duties*, 5th ed., 1896, pp. 52 *et seq.*

Excise Duty on Male Servants.—The Revenue Act, 1869, 32 & 33 Vict. c. 14, s. 18, imposes an excise duty of fifteen shillings for every male servant, to be paid annually upon licences to be taken out under the provisions of the Act by the person employing the servant. The term "male servant" means and includes any servant employed either wholly or partially in any of the following capacities; that is to say, *maître d'hôtel*, house steward, master of the horse, groom of the chambers, *valet de chambre*, butler, under-butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under-gardener, park-keeper, gamekeeper, under-gamekeeper, huntsman, and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants by whatever style the person acting in such capacity may be called (*ibid.* s. 19 (3)). But the term "male servant" does not include a servant who being *bonâ fide* employed in any capacity other than the ones above enumerated, is occasionally or partly employed in any of such capacities, nor does it include a person who has been *bonâ fide* engaged to serve his employer for a portion only of each day and does not reside in his employer's house (see the Customs and Inland Revenue Act, 1876, 39 Vict. c. 16, s. 5; see also *Yelland* v. *Winter*, 1885, 34 W. R. 121; *Spencer* v. *Sheerman*, 1871, 23 L. T. N. S. 873).

Every person who furnishes any male servant on hire is for the purposes of the Act deemed to be the employer of such servant (Revenue Act, 1869, s. 19 (4)). It is not necessary for licences to be taken out by any officer in Her Majesty's army or navy for any servant being a soldier in the army or a person actually borne upon the books of a ship, and employed by such officer in accordance with the regulations of Her Majesty's service, or by any licensed retailer of exciseable liquors or licensed keeper of a refreshment house for any servant employed by him solely for the purposes of his business, such servant being the only male servant employed by him (*ibid.* s. 19 (5)).

Consideration.—A contract for hiring and service, like all other simple contracts, is not legally enforceable unless entered into for valuable consideration (see *Lambert* v. *Northern*, 1869, 13 W. R. 180; see also the

article CONTRACT, *Consideration*). Such consideration is usually, but not necessarily, in the form of wages or a salary. In most cases, in the absence of rebutting circumstances, an agreement for the payment of wages would be implied from the mere fact of services rendered, and in such cases a *quantum meruit* could be recovered by the servant. But it is, of course, more usual for an express agreement to be entered into for the payment of specified wages.

The expectation of a legacy from the master might be the consideration for the services of the servant, and if there be a valid contract to that effect it will be enforceable against the executors (see *Loffus* v. *Maw*, 1862, 3 Gif. 592; see also *Hammersley* v. *De Biel*, 1845, 12 Cl. & Fin. 45; *Maddison* v. *Alderson*, 1883, 8 App. Cas. (H. L.) 467; *Synge* v. *Synge*, [1894] 1 Q. B. 466); but where services are rendered in expectation of a legacy, there being no contract by the master to leave a legacy, the servant cannot sue the executor for a *quantum meruit* (see *Osborn* v. *The Governors of Guy's Hospital*, 1726, 2 Stra. 728).

Where a servant agrees to leave the question of remuneration solely to the discretion of his master, the servant cannot even recover a *quantum meruit* (see *Taylor* v. *Brewer*, 1813, 1 M. & S. 290); though if there is a distinct agreement for some remuneration, the amount of it being left to the master's discretion, a *quantum meruit* is recoverable (see *Peacock* v. *Peacock*, 1809, 2 Camp. 45; *Bryant* v. *Flight*, 1839, 5 Mee. & W. 114; *Bird* v. *M'Gahey*, 1849, 2 Car. & Kir. 707). If an individual agrees to enter the service of another at such salary or for such wages as a third person should think reasonable, and no application is made to the third person to fix the amount of the salary or wages, nothing can be recovered in respect of the services (see *Owen* v. *Bowen*, 1829, 4 Car. & P. 93; see also *The London Tramways Co.* v. *Bailey*, 1877, 3 Q. B. D. 217). A servant is entitled to recover extra remuneration for extra services, such as work done out of hours or outside the scope of his ordinary employment, only where the extra work is clearly beyond the services which he is bound by his contract of hiring and service to perform, otherwise there would be no consideration for additional remuneration (see *Harris* v. *Carter*, 1854, 3 El. & Bl. 559; *Hartley* v. *Ponsonby*, 1857, 7 El. & Bl. 872).

Where some legal consideration exists, the Court, in accordance with the ordinary principles of contract law, will not inquire whether the consideration is in fact adequate (see *Hitchcock* v. *Coker*, 1837, 6 Ad. & E. 438). A contract of hiring and service entered into for immoral or illegal consideration is void (see CONTRACT, *Consideration*); also if it be in general restraint of trade it is, as a rule, void; as to the principles upon which a contract in restraint of trade will be valid and enforceable, see the judgments in *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*, [1894] App. Cas. (H. L.) 535; see also *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478; and the article RESTRAINT OF TRADE.

Specific Performance.—Specific performance of a contract of hiring and service cannot be obtained; the only remedy for its breach is damages. The relation established by the contract of hiring and service is of so personal and confidential a character that the Chancery Division now refuses to entertain jurisdiction in specific performance with regard to it (see *Gillis* v. *M'Ghee*, 1861, 13 Ir. Ch. Rep. 48; per Jessel, M. R., *Rigby* v. *Connol*, 1880, 14 Ch. D. at p. 487; see also *Ogden* v. *Fossick*, 1862, 4 De G., F. & J. 426; *De Francesco* v. *Barnum*, 1890, 45 Ch. D. 430). So where contractors agreed with a railway company to work the line and keep the

engines and rolling plant in repair at a specified remuneration, the Court refused to enforce it, holding it to be in fact a contract of hiring and service (see *Johnson* v. *The Shrewsbury and Birmingham Ruy. Co.*, 1853, 3 De G., M. & G. 914). On the same principle the Court refused to grant specific performance of a contract of apprenticeship against an infant (*De Francesco* v. *Barnum*, 1889, 43 Ch. D. 165; S. C. 1890, 45 Ch. D. 430).

Injunction to restrain Breach of Contract.—But when an executory contract contains negative as well as positive provisions, the Court will in some cases interfere by injunction to restrain a breach of the negative provisions, although the positive provisions are such as the Court would not grant specific performance of. Thus where an individual contracted to sing at a particular theatre and not to sing at any other, an injunction was granted restraining him from singing at any other theatre, though the Court could not enforce specific performance of the positive part of the contract (*Lumley* v. *Wagner*, 1852, 1 De G., M. & G. 604; see also *Grimston* v. *Cunningham*, [1894] 1 Q. B. 125). And where an actor had contracted to perform at a particular theatre, an injunction has been granted to restrain him from performing at a rival theatre, although there was no express stipulation on his part in the contract that he would not do so (*Webster* v. *Dillon*, 1857, 3 Jur. N. S. 432; *Montague* v. *Flockton*, 1873, L. R. 16 Eq. 189). But these cases have been disapproved in a more recent case, where the manager of a company agreed to give, during a specified term, the whole of his time to the company's business, and it was decided that, in the absence of any negative stipulation in that behalf, the company were not entitled to an injunction to restrain the manager from giving during the term part of his time to a rival company (*Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. (C. A.) 416: see also *Davis* v. *Foreman*, [1894] 3 Ch. 654). On the other hand, if in the contract there is a negative stipulation against giving services elsewhere, an injunction to restrain an infringement of such stipulation will be granted (see *Grimston* v. *Cunningham*, [1894] 1 Q. B. 125).

An injunction is also available in some cases to restrain other breaches of the terms, whether express or implied, of the contract of hiring and service. An injunction has, for example, been granted to restrain a clerk after he had left his master's service from making use of a list of names and addresses of the customers which he had improperly obtained during the service, his conduct being held to amount to a breach of an implied term in the contract of service (see *Robb* v. *Green*, [1895] 2 Q. B. 315). The communication of information acquired during service, such as trade secrets, has also been restrained by injunction (see *Merryweather* v. *Moore*, [1892] 2 Ch. 518). It has been laid down that the good faith which exists between an employer and those in his employ renders it improper and illegal for the persons so employed to make use after the termination of the employment of those matters which they learnt while they were in that confidential relationship, and the Court will grant an injunction to restrain such use in addition to awarding damages (see per Lindley, L.J., *Louis* v. *Smellie*, 1895, 73 L. T. at p. 228).

Rights and Duties of Master and Servant *inter se.*—*General.*—The rights and duties of master and servant are determined by the contract of hiring or service expressed or implied in each particular case. Some of the rights and duties of masters and servants are dictated by well-recognised rules of the common law or by the usage of particular

employments. Other duties are imposed by legislation; a large number of statutes imposing duties on masters and employers, and, consequently, creating correlative rights in servants or employees in particular services, trades, or employments. The sources of information with regard to the more important of these statutes have already been indicated.

Generally, it may be stated that a contract of hiring and service having been entered into, it becomes the duty of the master to take the servant into his service as agreed upon, to keep him in such service for the time specified, unless there are good grounds for dismissal, and to pay the wages or salary to which he is entitled under the agreement. The servant on his part is entitled to protection, and owes the duty of obedience to all the lawful and reasonable orders of his master, and must exercise due care and diligence in his master's affairs.

The right of a master to inflict corporal punishment has been asserted by the earlier writers to be recognised by the common law; whether it would be recognised at the present time, except, possibly, in the case of the moderate correction of young servants, towards whom the master is *in loco parentis* (see *Winstone* v. *Linn*, 1823, 1 Barn. & Cress. at p. 469), is extremely doubtful.

A master, in the absence of agreement to the contrary, is under a legal duty to furnish his domestic servants with proper food and lodging. He is not, however, apart from express agreement, obliged to provide them with medical attendance (see *Newby* v. *Wiltshire*, 1785, 4 Doug. K. B. 284; *Wennall* v. *Adney*, 1802, 3 Bos. & Pul. 247). As to the law with regard to apprentices, see APPRENTICE.

The provision of food, lodging, etc., by a master for his servant is, in the case of servants other than domestic servants, simply a matter of contract.

The neglect to provide suitable food or lodging for a servant where the master is legally liable to do so may, in addition to giving rise to a civil claim, amount to a criminal offence.

If a master who is legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse neglects to provide the same, whereby the health of the servant or apprentice is, or is likely to be, seriously or permanently injured, he is guilty of a misdemeanour, and liable to a fine of £20, or to imprisonment for three months with hard labour (the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, ss. 5 and 6). Moreover, if a person who being legally liable, either as a master or a mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does, or causes to be done, any bodily harm to such apprentice or servant, so that the life of such apprentice or servant is endangered, or that his health has been or is likely to be permanently injured, he, the master, is guilty of misdemeanour, and is liable to five years' penal servitude (see the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 26).

The master must also indemnify his servant for all loss or expenses incurred in the course of carrying out his lawful orders. This is simply an enunciation of the well-known principle of the law of agency. For further information on this subject, reference should be made to the article PRINCIPAL AND AGENT.

The common law recognises the rights of master and servant to use the force necessary to defend each other from the assault of a third person (see *Leeward* v. *Basilee*, 1695, 1 Salk. 407; *Tickell* v. *Read*, 1773, Lofft, 215).

Certain conduct or acts which would at common law amount to maintenance, and as such afford ground for civil or criminal proceedings, may be justifiable where the relation of master and servant exists (see generally the article MAINTENANCE; see also *Bradlaugh* v. *Newdegate*, 1883, 11 Q. B. D. at p. 11). On this principle it has recently been held that where an action is brought against a servant for a libel published by him in his master's newspaper for which both the master and the servant are liable, the master is entitled to undertake the defence of his servant (see *Breay* v. *Royal British Nurses Association*, [1897] 2 Ch. 272).

Duration of the Contract of Service.—Where the contract is in writing, the duration of the hiring must be gathered from it, and evidence of intention is not then admissible (see *Evans* v. *Roe*, 1872, L. R. 7 C. P. 138). If, as is frequently the case, the contract of hiring and service is entered into without any time being expressly mentioned or agreed upon between the parties as the time for the duration of the contract, the hiring is presumably for one year. Numerous decisions support the rule that, in the case of domestic and menial servants at anyrate, an indefinite or general hiring is to be construed as a hiring for a year (see *R.* v. *Worfield*, 1794, 5 T. R. 506; *Turner* v. *Robinson*, 1833, 5 Barn. & Adol. 789; *Lilley* v. *Elwin*, 1848, 11 Q. B. 742). And the fact that under the contract wages are payable monthly is not sufficient to rebut the presumption that a general hiring is a hiring for a year (see *Fawcett* v. *Cash*, 1834, 5 Barn. & Adol. 904; see also *Beeston* v. *Collyer*, 1827, 4 Bing. 309; *Williams* v. *Byrne*, 1857, 7 Ad. & E. 177; *Davis* v. *Marshall*, 1861, 4 L. T. N. S. 266; *Forgan* v. *Burke*, 1861, 12 Ir. C. L. R. 495). The general presumption may, however, be rebutted by proof of a contrary usage, for the rule that an indefinite hiring is a yearly hiring is not a rule of law (see *Baxter* v. *Nurse*, 1844, 6 Man. & G. 935).

There is no inflexible rule that an indefinite hiring of a clerk or other servant must be construed as a hiring for a year (see *Fairman* v. *Oakford*, 1860, 5 H. & N. 635; *Nayler* v. *Yearsley*, 1860, 2 F. & F. 41). A stationery clerk employed in a telegraph office at a salary of £135 a year, which was at first paid monthly, but afterwards fortnightly, was held to be merely entitled to a month's notice (*Vibert* v. *Eastern Telegraph Co.*, 1883, 1 C. & E. 17; see also *Byrne* v. *Schott*, cited *ibid.* p. 17, note). In each case, indeed, it will rest with the jury to determine what are the terms of the contract from a consideration of the particular circumstances (*ibid.*; see also *Fairman* v. *Oakford*, 1860, 5 H. & N. 635; *Warburton* v. *Heyworth*, 1880, 6 Q. B. D. 1). Thus it has been held that in the case of the employment of a master of a ship, although at a yearly wage, the hiring is not for a year certain, but can be determined upon reasonable notice (*Green* v. *Wright*, 1876, 1 C. P. D. 591). And a hiring at weekly wages, even a hiring for so much a week for one year, has frequently been held to be merely a hiring by the week, and not by the year (see *R.* v. *The Inhabitants of Dodderhill*, 1814, 3 M. & S. 243; *Robertson* v. *Jenner*, 1867, 15 L. T. 514; *Evans* v. *Roe*, 1872, L. R. 7 C. P. 138).

Disputes between Master and Servant as to Wages, etc.—Under the Employers and Workmen Act, 1875, disputes between employers and workmen may, when the amount claimed does not exceed £10, be heard and determined by a Court of summary jurisdiction (*e.g.* by a metropolitan police magistrate, a stipendiary magistrate, or justices of the peace), and the Court may order payment of any sum, not exceeding £10, exclusive of costs,

which it may find to be due as wages or damages (see s. 4). The Act does not apply to domestic or menial servants, but includes any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one or not, has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, a contract of service or a contract personally to execute any work or labour (*ibid.* s. 10). See also EMPLOYERS AND WORKMEN.

In the case of menial or domestic servants, the remedy for the recovery of wages is by action in the County Court, where the amount claimed does not exceed £50, or if the claim exceeds that amount by action in the High Court, unless by consent of the parties the action is brought in the County Court (see COUNTY COURTS).

A servant may agree to forfeit his wages for breach of his employer's rules (see *Walsh* v. *Walley*, 1874, L. R. 9 Q. B. 367), but in such case he must have an opportunity of being heard before his wages can be forfeited, otherwise he will be able to sue for his wages notwithstanding the agreement (see *Armstrong* v. *The South London Tramways Co.*, 1890, 64 L. T. 96).

It is not necessary for an infant when suing to recover wages in the County Court to sue by his next friend or guardian, as in ordinary actions. An infant is expressly empowered by statute to prosecute any action in the County Court for any sum of money not exceeding £50 due to him for wages or piecework or for work as a servant, in the same manner as if he were of full age (County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 96).

It may here be mentioned that the same remedies are open to a master, as to any other person, in respect of a breach of contract or any tortious act on the part of his servant causing damage. The master, also, can institute criminal proceedings against his servant, and in a proper case give him into custody (see, for instance, *Shaw* v. *Chairitie*, 1850, 3 Car. & Kir. 21) as if he were a stranger.

As to the preferential claims of clerks and servants in the case of bankruptcy, see the Preferential Payments in Bankruptcy Act, 1888, 51 & 52 Vict. c. 62.

Master's Liability for Injury to Servant.—The liability of a master for accident happening to his servant is, it has been said, not due to principles peculiar to the relation of master and servant, so much as to the application of the general governing principles of law that where fault is there is liability, *culpa tenet suos auctores tantum*, and that in the absence of fault there is, *primâ facie* at anyrate, an absence of liability (Beven on *Negligence*, 2nd ed., 1895, vol. i. p. 734). The same writer in considering the master's liability says: "In short, the duty which the master owes the servant is just the same that he owes to every other person with whom he has business relations; he must not conceal from him dangerous circumstances which if known might cause him to alter his position, nor personally be negligent in any respect. For damage caused by the ordinary risks of employment the master is not liable. First, because there is no fault in the master; second, because the risk arises out of the very thing to be done—the coming in contact with agencies that may be dangerous and men who may be negligent, with respect to which the master can exercise no absolutely protective power, or does not specifically contract to do so; third, because workmen undertaking a work must be supposed to have a prevision of its ordinary risks as well as of its labours, and as they secure by their engage-

ment remuneration for the one they must be held to secure insurance in their wages against the other" (*ibid.* p. 735).

In respect of the negligence of a servant within the scope of his employment, a master is, as will be seen, responsible (see *post*, under head *Master's Liability for Torts of Servant*); but when the negligence of a servant occasions injury to a fellow-servant engaged in a common employment, the master is at common law, as a general rule, under no liability.

As to the doctrine of common employment and the construction of the maxim *Volenti non fit injuria*, see *Priestly* v. *Fowler*, 1838, 3 Mee. & W. 1; *Thomas* v. *Quartermaine*, 1887, 18 Q. B. D. 685; *Yarmouth* v. *France*, 1888, 19 Q. B. D. 647; *Johnson* v. *Lindsay*, [1891] App. Cas. 371; *Smith* v. *Baker*, [1891] App. Cas. 3; *Hedley* v. *Pinkney Shipping Co.*, [1894] App. Cas. 222. See also the article EMPLOYERS' LIABILITY, and Beven on *Negligence*, 2nd ed., 1895, vol. i. pp. 796–834.

The common law principle has, however, been considerably affected by recent legislation. Under the provisions of the Employers Liability Act, 1880, 43 & 44 Vict. c. 42, a servant is, under some circumstances and within certain restrictions, given a right of action against his master in respect of injuries caused by the negligence of a fellow-servant. Moreover, by the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37, an employer in certain specified trades is, after the 1st July 1898, liable to compensate a workman in his employment for injuries arising out of and in the course of his employment, whether the accident is due to want of care on the part of the employer or of his servants or not.

The common law and statutory liability of an employer to make compensation to his workmen in respect of personal injuries suffered in the course of their employment, is treated of in the article EMPLOYERS' LIABILITY; see also NEGLIGENCE, *Contributory Negligence*, and the maxim *Volenti non fit injuria* in the article MAXIMS, LEGAL.

SERVANT'S CHARACTER.—It is a well-known rule of the common law that a master is under no legal obligation to give his servant a character. It is, in the absence of express agreement, entirely at the option of the master to give his servant a character or to decline to do so (see *Carrol* v. *Bird*, 1800, 3 Esp. 201). Where, however, a master does give his servant a character, whether in writing or by word of mouth, he should be careful to confine himself to such statements as he has reasonable ground for believing to be true.

Statements as to, privileged.—Statements made by a master as to the character of his servant are regarded by law as within the category of privileged communications, and no action will lie in respect of such statements, whether verbal or in writing, even though they are in fact untrue, unless malice can be expressly proved (see *Edmondson* v. *Stevenson*, 1766, Bull. N. P. 8; *Child* v. *Affleck*, 1829, 9 Barn. & Cress. 403).

Any communication made *bonâ fide* on any subject-matter in which the party communicating it has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty (see per Lord Campbell, C.J., *Harrison* v. *Bush*, 1856, 5 El. & Bl. 344). Under such circumstances, therefore, a statement as to a servant's character made by a person other than the master will be a privileged communication (see, for example, *Cowles* v. *Potts*, 1865, 34 L. J. Q. B. 247; *Hamon* v. *Falle*, 1879, L. R. 4 App. Cas. 247). The fact of the presence of

third parties when a defamatory statement is made regarding a servant's character will not necessarily prevent its being a privileged communication (see *Toogood* v. *Spyring*, 1834, 3 L. J. Ex. 347; *Somerville* v. *Hawkins*, 1851, 20 L. J. C. P. 133; *Taylor* v. *Hawkins*, 1851, 16 Q. B. 308; *Manby* v. *Witt*, 1886, 25 L. J. C. P. 294). See further the article PRIVILEGED COMMUNICATION.

Action for Defamation of.—In order to maintain an action in respect of defamatory statements made by his master as to his character, the servant must be able to prove that they are false, and that they were written or spoken maliciously, and not *bonâ fide* (see *Sims* v. *Kinder*, 1824, 1 Car. & P. 279; see also *Weatherston* v. *Hawkins*, 1786, 1 T. R. 110). In such a case malice is the gist of the action, and, in the absence of direct proof of malice, no action will lie, the general rule being that anything said or written by a master when he gives the character of a servant is a privileged communication. Where, therefore, it is clear that the defamatory words are nothing more than a communication from one master to another as to the character of a servant, the judge will not allow the case to go to the jury (see per Lord Denman, C.J., *Kelly* v. *Partington*, 1833, 4 Barn. & Adol. at p. 700; see also *Somerville* v. *Hawkins*, 1851, 20 L. J. C. P. 133). On the other hand, where a *primâ facie* case of malice is raised, it is the function of the jury to determine whether under the particular circumstance a want of *bona fides* and malice is in fact proved (see *Somerville* v. *Hawkins*, 1851, cited *supra*; *Fountain* v. *Boodle*, 1842, 3 Q. B. 5; *Gilpin* v. *Fowler*, 1854, 9 Ex. 152). With regard to the question of *bona fides* in the case of a defamatory statement as to a servant's character having been made by the master, it may be of material importance to consider whether the master gave the character of his own accord or whether he had been asked for it (see *Fryer* v. *Kinnersley*, 1884, 33 L. J. C. P. 98; and see *Gilpin* v. *Fowler*, 1854, cited *supra*). It has been said that when the master volunteers to give a character, stronger evidence will be required that he acted *bonâ fide* than in the case where he has given a character after being required to do so (see per Littledale, J., *Pattison* v. *Jones*, 1828, 8 Barn. & Cress. at p. 586).

Even where a defamatory statement as to a servant's character is made by a master maliciously and with intention to injure the servant, in order to sustain an action in respect of the malicious statement the servant must prove that some special damage has accrued to himself as the result of such statement (see *Vicars* v. *Wilcock*, 1806, 8 East, 1; *Knight* v. *Gibbs*, 1834, 1 Ad. & E. 43; *Lynch* v. *Knight*, 1861, 9 H. L. 577), or that the words are actionable *per se* without proof of special damage, as, for example, reflecting on the servant in his capacity as servant (see *Irwin* v. *Brandwood*, 1864, 33 L. J. Ex. 257; *Foulger* v. *Newcomb*, 1867, 36 L. J. Ex. 169), or imputing dishonesty or other criminal offence. See further as to the principles upon which an action is maintainable in respect of the defamation of a servant's character, the articles DEFAMATION; MALICE; PRIVILEGED COMMUNICATION.

Action by Master for Damage from False Character.—It has already been mentioned that a master is not obliged to give a servant a character, but where he takes upon himself to do so, whether of his own accord, or upon the request of another person who is intending to take the servant into his employment, it is most important for him to limit his statements to matters within his own knowledge, and merely to give such a

character as he has reasonable ground for supposing to be true. For if a master makes representations that he knows to be false as to the character of a servant, and the person to whom the representation is made takes the servant into his employ in reliance upon such statements, and in consequence of so doing suffers damage, he can bring an action to recover such damage from the former master who gave the false character, notwithstanding that the character was given without any malice or ill-will towards the new employer and without any pecuniary interest (see *Foster* v. *Charles*, 1830, 7 Bing. 105; *Wilkin* v. *Read*, 1854, 15 C. B. 192).

Criminal Proceedings in respect of False Character.—Moreover, penal consequences are attached to the giving or counterfeiting of false testimonials as to character, and to the use of such testimonials.

The Servants' Character Act, 1792, 32 Geo. III. c. 56, provided that any person who falsely personates any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant of any master or mistress, and either personally or in writing gives any false, forged, or counterfeit character to any person offering himself to be hired as a servant shall, upon conviction before two or more justices of the peace, be liable to a fine of £20, or in default of payment to imprisonment with hard labour (see ss. 1 and 6). Any person who knowingly and wilfully pretends, or falsely asserts in writing, that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he had hired or retained such servant in his service or employment, or for the service of any other person, is subject to the same penalty (*ibid.* s. 2). Any person who knowingly and wilfully pretends, or falsely asserts in writing, that any servant was discharged or left his service at any other time than that at which he was discharged or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth, is subject to the same penalty (*ibid.* s. 3). Any person who offers himself as a servant, and asserts or pretends that he has served in any service in which he had not actually served; or with a false, forged, or counterfeit certificate of his character; or in anywise adds to, or alters, effaces, or erases any word, date, matter, or thing contained in or referred to in any certificate given to him by his last or former master or mistress, or by any other person duly authorised by such master or mistress to give the same, is subject to the same penalty (*ibid.* s. 4). And any person who having before been in service who when offering to hire himself as a servant in any service whatsoever, falsely and wilfully pretends not to have been hired or retained in any previous service as a servant, is also liable to the same penalty (*ibid.* s. 5). An appeal lies from such a conviction to Quarter Sessions (*ibid.* s. 10).

Apart from this statute, the forging or uttering of a forged testimonial or recommendation as to character with intent to deceive may amount to the misdemeanour of forgery at common law (see *R.* v. *Sharman*, 1854, 6 Cox C. C. 212; *R.* v. *Moah*, 1858, 27 L. J. M. C. 204).

WRONGFUL ACTS OF THIRD PARTIES AFFECTING THE CONTRACT OF SERVICE.—Any wrongful act of a third party which causes loss of service to a master, unless, indeed, it result in the death of the servant (see *Osborn* v. *Gillett*, 1873, 42 L. J. Ex. 53), will entitle the master to sue for damages. So a master may bring an action to recover damages for an assault on his servant, even if the servant has recovered damages in respect of the

same assault (see *Jones* v. *Brown*, 1794, 1 Pea. 306; *Hodsell* v. *Stallebrass*, 1840, 11 Ad. & E. 301; *Ditcham* v. *Bond*, 1814, 2 M. & S. 436).

Enticing away Servant.—An action for damages for loss of service is maintainable by a master against any person who induces his servant to leave his service during the subsistence of the contract of hiring and service (see *Evans* v. *Walton*, 1867, L. R. 2 C. P. 615; *Lumley* v. *Gye*, 1853, 2 El. & Bl. 216).

The origin of the common law action for enticing away a servant *per quod servitium amisit* is discussed in the judgments in the case of *Lumley* v. *Gye* (cited *supra*). In that case it was held that an action for damages could be maintained against a person who had induced an opera singer to break her contract to sing at a particular theatre for a certain specified time.

A person who continues to employ the servant of another after notice of the existence of a prior contract of service, is liable to an action for damages at the suit of the former master (see *Blake* v. *Lanyon*, 1795, 6 T. R. 221).

And even though, strictly, the relation of master and servant does not exist between the employer and the person employed, an individual can sue a third party for maliciously inducing a person under contract with him to break his contract of personal service if injury is thereby caused (*ibid.*; see also *Bowen* v. *Hall*, 1881, 6 Q. B. D. (C. A.) 333; *De Francesco* v. *Barnum*, 1890, 63 L. T. 514). See further as to actions for maliciously procuring a breach of contract, *Temperton* v. *Russell*, [1893] 1 Q. B. 715; and the judgments of the House of Lords in the recent important case of *Allen* v. *Flood*, [1898] 1 App. Cas. 1, where all the previous authorities are exhaustively considered. See also the articles COMBINATIONS; CONSPIRACY; TRADE UNION.

Seduction of Servant.—A master is entitled to sue for damages for the seduction of his servant which causes loss of service (see *Fores* v. *Wilson*, 1791, 1 Pea. 55; *Hall* v. *Hollander*, 1825, 4 Barn. & Cress. 663). The action for seduction is founded upon the wrong done to the person who is entitled to the services of the person seduced. The action is in fact based either upon an actual contract of service, or, more frequently, upon the bare fiction of service, and is to recover damages *per quod servitium amisit*. Some proof that the person seduced was in the service of the plaintiff at the time of the seduction is essential (see *Davies* v. *Williams*, 1847, 10 Q. B. 725). But it is not necessary that there should be any payment of wages (see *Evans* v. *Walton*, 1867, L. R. 2 C. P. 615). In the case of the seduction of a daughter who is a minor living in her father's house, the service, it has been said, may be presumed (see per Littledale, J., *Maunder* v. *Venn*, 1829, Moo. & M. 323; per Bovill, C.J., *Evans* v. *Walton*, 1867, L. R. 2 C. P. at p. 619; see also *Harris* v. *Butler*, 1837, 2 Mee & W. at p. 542). At anyrate in the case of a daughter, whether of full age or not, even the slightest evidence of service will be sufficient to support the action (see *Bennett* v. *Allcott*, 1787, 2 T. R. 168; *Carr* v. *Clarke*, 1818, 2 Chit. 260; *Rist* v. *Faux*, 1863, 4 B. & S. 409; *Terry* v. *Hutchinson*, 1868, L. R. 3 Q. B. 599). It is necessary also to prove some loss of service consequent on the seduction (see *Eager* v. *Grimwood*, 1847, 1 Ex. 61). Although the action is strictly founded upon the loss of service, in practice the loss of service is not the measure of the damage. In this class of action the damages are assessed by the jury with great latitude, the injured

feelings of the plaintiff being taken into account, and the damages are in fact frequently vindictive (see per Lord Eldon, *Bedford* v. *M'Kowl*, 1800, 3 Esp. at p. 120; *Grinnell* v. *Wells*, 1844, 7 Man. & G. 1033; see also DAMAGES; SEDUCTION).

Injury causing Death of Servant.—Though a master is entitled to bring an action for an injury to his servant by a wrongful act or neglect of a third party, which causes loss of service to the master, yet the common law principle embodied in the maxim *Actio personalis moritur cum personâ* has been so extended by judicial construction as to exclude the right of a master to any compensation whatever, if such an injury results in the death of the servant (see *Osborn v. Gillett*, 1873, L. R. 8 Ex. 88). It should, however, be observed that Lord Bramwell strongly dissented from the doctrine, and the decision has been adversely criticised by modern writers (see Smith on *Negligence*, 2nd ed., 1884, p. 256; Pollock on *Torts*, 4th ed., 1895, pp. 57–59; Beven on *Negligence*, 2nd ed., 1895, vol. i. p. 211). The common law rule that there is no civil remedy for a personal injury causing death has, indeed, been modified to some extent by the Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act, which gives a right of action to the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default of another, such as would, if death had not ensued, entitle the party injured to maintain an action (see CAMPBELL'S (LORD) ACT (ACCIDENTS)).

MASTER'S LIABILITY TO THIRD PARTIES FOR ACTS OF SERVANT.—*Master's Liability for Contracts of Servant.*—Whether a master is liable on a contract entered into on his behalf by his servant depends on the servant's authority to enter into such contract. The mere relation of master and servant in itself confers no such authority. The liability is, in fact, determined by the ordinary principles of the law of agency (see PRINCIPAL AND AGENT). A servant may have express authority from his master to enter into a contract on his behalf, in which case the master is obviously liable. Or a servant may be placed in such a position, or intrusted with duties of such a nature, that a capacity to contract on behalf of the master is a necessary incident to the proper performance of his duties. In this case, within certain limits, an authority is implied. Again, the master may be under a liability on contracts entered into by his servant, where by his conduct he has induced the belief in third parties dealing with the servant that the servant had his authority. And lastly, a master may become liable by ratification of his servant's contract, in which case the subsequent ratification will supply the previous want of authority.

See further as to the liability of a master for the contracts of his servant, the circumstances under which a servant has authority to enter into contracts on behalf of his master, to pledge his credit, to bind his master by giving a warranty, etc., the article PRINCIPAL AND AGENT; see also the maxim *Qui facit per alium facit per se* in the article MAXIMS, LEGAL.

Master's Liability for Torts of Servant.—A person may be under a liability in respect of the wrongful acts or negligence of another as having authorised or ratified the particular act, or as standing towards the other person in a relation entailing responsibility for wrongs done by that person though not specifically authorised, and even, in some cases, though expressly forbidden; such a relation is that of master and servant.

Where the relation of master and servant exists, the test of the liability

of the master for the tortious acts or negligence of his servant is whether the act was done or omitted by the servant within the scope of his employment. A master is under a liability to third persons for all wrongful acts and negligence, including malfeasances or misfeasances, of his servant in the course of his employment, although the master did not authorise, or was not cognisant of, or had even expressly forbidden the acts or omissions in question.

The general rule is, that a master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved (see per Willes, J., *Barwick* v. *English Joint-Stock Bank*, 1867, L. R. 2 Ex. at p. 265; per Lord Selborne, *Houldsworth* v. *City of Glasgow Bank*, 1880, 5 App. Cas. (H. L.) at p. 326; see also *Laugher* v. *Pointer*, 1826, 5 Barn. & Cress. at p. 554). "That principle," it was said in the judgments of the Court of Exchequer Chamber in the leading case of *Barwick* v. *English Joint-Stock Bank*, "is acted upon every day in running down cases. It has been applied to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo (*Ewbank* v. *Nutting*, 1849, 7 C. B. 797). It has been held applicable to actions for false imprisonment in cases where officers or servants of railway companies intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws (see *Goff* v. *The Great Northern Rwy. Co.*, 1861, 3 El. & El. 672; *Roe* v. *Birkenhead Rwy. Co.*, 1852, 7 Ex. 36). It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong (see *Huzzey* v. *Field*, 1835, 2 C. M. & R. at p. 440). In all these cases it may be said that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the servant or agent in his place to do that class of acts, and he must be answerable for the manner in which the servant or agent has conducted himself in doing the business which it was the act of his master to place him in" (see per Willes, J., *Barwick* v. *English Joint-Stock Bank*, 1867, L. R. 2 Ex. at p. 265).

A master is liable for acts of his servant which are contrary to his express orders, if the acts are within the scope of the employment, and are intended to be for the master's benefit; thus an omnibus company was held liable for injuries caused by an accident arising from a driver in their employ racing his horses with those in another omnibus, although racing was directly prohibited by the regulations of the company (see *Limpus* v. *The London General Omnibus Co.*, 1862, 1 H. & C. 526; see also *Ward* v. *The London General Omnibus Co.*, 1873, 42 L. J. C. P. 265; *Smith* v. *The North Metropolitan Tramways Co.*, 1891, 55 J. P. 630; *Black* v. *Christchurch Finance Co.*, [1894] App. Cas. 48).

A railway company is liable for the loss of luggage intrusted by passengers to the charge of its porters or other servants (see *Richards* v. *London, Brighton, and South Coast Rwy. Co.*, 1847, 7 C. B. 839; *Bergheim* v. *South-Eastern Rwy. Co.*, 1886, 17 Q. B. D. 215; *Bunch* v. *Great Western Rwy. Co.*, 1888, 13 App. Cas. 361). But where a railway servant takes charge of luggage beyond the scope of his employment, as, for instance, where the passenger leaves the station for a considerable time, the company are under no liability (see *Welch* v. *The London and North-Western Rwy. Co.*, 1886, 34 W. R. 166; see also *Hodkinson* v. *The London and North-Western Rwy. Co.*, 1884, 14 Q. B. D. 228).

As to the liability of carriers for the acts of their servants, see generally the article CARRIER.

An innkeeper is liable in respect of the negligence of his servants by which the property of a guest is lost, but not if the guest was guilty of contributory negligence (see *Medawar* v. *The Grand Hotel Co.*, [1891] 2 Q. B. 11; *Huntly* v. *The Bedford Hotel Co.*, 1892, 56 J. P. 53; see also *Strauss* v. *The County Hotel Co.*, 1883, 12 Q. B. D. 27). An innkeeper is also liable for the theft by his servant of the property of a guest (see *Oppenheim* v. *White Lion Hotel Co.*, 1871, L. R. 6 C. P. 515). The common law liability of an innkeeper has been modified to some extent by the Innkeepers Act, 1863, 26 & 27 Vict. c. 41. See generally as to the liability of an innkeeper for the acts of his servant, the article INNKEEPER. As to the liability of a lodging-house keeper for the negligence or dishonesty of his servants, see *Dansey* v. *Richardson*, 1854, 3 El. & Bl. 144; *Holder* v. *Soulby*, 1860, 29 L. J. C. P. 246; see also APARTMENTS; LODGER.

Moreover, a master is liable for the fraud of his servant, and may be sued for the fraudulent misrepresentation of his agent acting in the usual course of his business (see *Barwick* v. *English Joint-Stock Bank*, 1867, L. R. 2 Ex. 259; see also *Addie* v. *The Western Bank of Scotland*, 1867, L. R. 1 H. L. Sc. 145; *Houldsworth* v. *City of Glasgow Bank*, 1880, 5 App. Cas. 317).

A master, on the other hand, is not liable in an action of deceit for the unauthorised and fraudulent act of a servant, committed not for the general or special benefit of the principal, but for the servant's private ends (*The British Mutual Banking Co.* v. *The Charnwood Forest Rwy. Co.*, 1887, 18 Q. B. D. 714; see also *Croft* v. *Alison*, 1821, 4 Barn. & Ald. 590; *Limpus* v. *London General Omnibus Co.*, 1862, 1 H. & C. 526; *Ward* v. *The General Omnibus Co.*, 1872, 42 L. J. C. P. 265).

And a master may be liable to a civil action in respect of the criminal act of his servant; where, for example, the conductor of a tramway company in the course of his employment assaulted a passenger, the company were held to be liable to an action for damages (see *Smith* v. *The North Metropolitan Tramways Co.*, 1891, 7 T. L. R. 459).

But though a master is thus liable for the acts of his servants within the scope of their regular employment, or even for their acts done during a partial deviation from their employment (see *Whatman* v. *Pearson*, 1868, L. R. 3 C. P. 422), and even if the act itself be wrongfully and illegally done (see *Smith* v. *The North Metropolitan Tramways Co.*, 1891, 55 J. P. 630), his liability does not extend to acts of his servants which are wholly outside the scope of their authority. For example, where a servant in charge of his master's carriage or cart drives it entirely for his own purposes or to transact business of his own, and thus for the time being totally deviates from his employment, the master is not liable for any injuries or damage caused by the servant in the course of such deviation (see *Mitchell* v. *Crassweller*, 1853, 13 C. B. 237; *Storey* v. *Ashton*, 1869, L. R. 4 Q. B. 476; *Rayner* v. *Mitchell*, 1877, 3 C. P. D. 357). Where the servant of a tramway company having express instructions not to give anyone into custody without the authority of the inspector, except for assault, gives a person into custody on a charge of attempting to pass counterfeit coin, he is acting beyond the scope of his authority, and the company are consequently under no liability for his act (see *Charleston* v. *The London Tramways Co.*, 1888, 86 W. R. 367; see also *Furlong* v. *The South London Tramways Co.*, 1885, 48 J. P. 322).

A servant has only an implied authority to give a person into custody

when it is necessary to take such a step to protect his master's property. If, therefore, a servant give a person into custody when no such danger exists, the master is not liable in an action for false imprisonment (see *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Stevens* v. *Hinshelwood*, 1891, 55 J. P. 341).

Where the master himself has no power to do the act in question, the servant can obviously have no implied authority to do it, and consequently there is no liability in the master for such an act done by his servant (see *Poulton* v. *London and South-Western Rwy. Co.*, 1867, L. R. 2 Q. B. 534). So where the manager of a restaurant gave a person into custody for refusing to pay the amount of his bill, the accuracy of which he disputed, the proprietors were held not to be liable for the act of the manager (*Stedman* v. *Baker & Co.*, 1896, 12 T. L. R. 451).

Where the driver of an omnibus had been removed from the box by a policeman on account of intoxication, and he, the driver, and the conductor authorised a stranger to drive the omnibus to the yard, which was not far away, it was held that the omnibus company were not liable for damages to another vehicle on the way to the yard, the servants of the company having acted beyond the scope of their authority in allowing another person to drive, the circumstances not being such as to create an authority by necessity (see *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84).

Whether in any particular case a servant is acting within the scope of his employment so as to entail responsibility on his master for his acts and defaults must be determined according to the circumstances; it is a question which is frequently difficult to determine (see, for example, *Sleath* v. *Wilson*, 1839, 9 Car. & P. 607; *Whatman* v. *Pearson*, 1858, L. R. 3 C. P. 422; *Storey* v. *Ashton*, 1869, L. R. 4 Q. B. 476; *Rayner* v. *Mitchell*, 1877, 2 C. P. D. 357; *Stevens* v. *Woodward*, 1881, 6 Q. B. D. 318; *Milner* v. *Great Northern Rwy. Co.*, 50 L. T. 367; *Ruddiman* v. *Smith*, 1891, 60 L. T. 708; *Mulkern* v. *Metropolitan Rwy. Co.*, 1892, 8 T. L. R. 232; *Lowe* v. *Great Northern Rwy. Co.*, 1893, 9 T. L. R. 516; *Ashton* v. *Spiers & Pond*, 1893, 9 T. L. R. 606; *Newwirk* v. *The Over Darwen Industrial Society*, 1894, 10 T. L. R. 282).

The decisions as to the liability of a master for the wrongful acts or negligence of a servant within the scope of his employment are, indeed, so numerous that it is here possible, owing to limits of space, merely to refer to a few of the more important cases which illustrate the well-established principle.

Though a master is liable for any damage arising to a third person from the negligence or unskilfulness of his servant acting in his employ, there is this important limit that a master is under no liability for the wilful act of his servant, as where he wilfully drives his master's carriage against another carriage without the direction or assent of the master (*M'Manus* v. *Crickett*, 1800, 1 East, 106; *Croft* v. *Alison*, 1821, 4 Barn. & Ald. 590).

To constitute liability for the wrongful acts or negligence of another, unless, indeed, such acts are expressly authorised or subsequently ratified, it must be proved that the relation of master and servant exists at the time of the act or default (see *Lucas* v. *Mason*, 1875, L. R. 10 Ex. 251).

The relation of master and servant, says Sir Frederick Pollock, exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, in other words, retains the power of controlling the work; and he who does work on those terms is in law a servant, for whose acts, neglects, and defaults the master is liable (see Pollock on *Torts*, 4th ed.,

1895, at p. 72; see also *Sadler* v. *Henlock*, 1855, 4 El. & Bl. at p. 578; *Dalzell* v. *Tyrer*, 1858, 28 L. J. Q. B. 52; *Quarman* v. *Burnett*, 1840, 6 Mee. & W. 499).

In this respect an independent contractor is to be distinguished from a servant; in the employment of an independent contractor the principal does not retain control over the work. A consequent difference of liability results, for a master, as a general rule, is liable for the acts of a servant in the course of his employment; but a person who employs an independent contractor is, as a general rule, not responsible for the acts of such contractor (see CONTRACTOR, vol. iii. at p. 351). In other words, when an independent contractor is employed to do work, the workmen or servants employed by him are not, generally, the servants of the person employing the contractor so as to entail on him liability for their acts (see *Rapson* v. *Cubitt*, 1842, 9 Mee. & W. 760; *Reedie* v. *The London and North-Western Rwy. Co.*, 1849, 4 Ex. 244; *Peachey* v. *Rowland*, 1853, 22 L. J. C. P. 81). So a corporation is not liable for the acts of servants of a contractor who supplies horses and drivers for watering carts belonging to the corporation (see *Jones* v. *The Mayor, etc., of Liverpool*, 1885, 14 Q. B. D. 890, following *Quarman* v. *Burnett*, 1840, 6 Mee. & W. 499). Where a contractor is employed by a shipping company to unload their ship, and some of the crew are employed to assist in the unloading, it is a question of fact whether the members of the crew so employed are under the orders and control of the contractor's foreman or not so as to render the company liable to one of the contractor's workmen who was injured through the negligence of such members of the crew (see *The Union Steamship Co.* v. *Claridge*, [1894] App. Cas. 185). But an employer is liable for the negligence of servants engaged by his foreman, such foreman not being an independent contractor (see *Oldfield* v. *Furness, Withy, & Co.*, 1893, 9 T. L. R. 515).

Contrary to the general rule, however, a person who employs an independent contractor will become liable for the tortious acts of such contractor where he, the employer, personally interferes in the conduct of the work (see *Burgess* v. *Gray*, 1845, 6 C. B. 378); where the thing contracted to be done is in itself unlawful (see *Ellis* v. *The Sheffield Gas Co.*, 1853, 23 L. J. Q. B. 42); where the thing contracted to be done is lawful in itself, but is such that injurious consequences must result unless proper precaution be taken (see *Bower* v. *Peate*, 1876, 1 Q. B. D. 321; *Tarry* v. *Ashton*, 1876, *ibid.* 314); or where the employer is under a legal obligation to carry out the particular work efficiently (see *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; see also *Hole* v. *Sittingbourne Rwy. Co.*, 1865, 6 H. & N. 488).

On the same principle a master is under no liability for the acts of his servant whom he has temporarily lent to another person, the acts of the servant being for the time being beyond his control. When, therefore, an individual lends his servant to another for a particular employment, the servant in respect of acts done in such employment must be considered as the servant of the person by whom he is for the time being employed, although he remains the general servant of his master who has temporarily lent him to such person, and this, apparently, whether his master receives consideration for the services of the servant or whether he lends his servant gratuitously (see *Donovan* v. *Laing*, [1893] 1 Q. B. 629; see also *Rourke* v. *White Moss Colliery Co.*, 1877, 2 C. P. D. 205; *Jones* v. *Mayor, etc., of Liverpool*, 1885, 14 Q. B. D. 890; *Cameron* v. *Nystrom*, [1893] App. Cas. 308).

Questions have also arisen with regard to the liability of a master for

the negligence of his servant where the act of a third party intervenes between the servant's negligence and the injury. The rule has been laid down that, where the negligence of the servant is the effective cause of the damage, the mere intervention of the act of some other person will not relieve the master from his liability. So where a master employed a man to drive a cart with instructions not to leave it, and also employed a boy to go in the cart to deliver parcels, but who was forbidden to drive, and the driver left the cart with the boy in it, and in his absence the boy drove on and collided with a carriage, it was held that the master was liable for the damages caused by the collision, the negligence of his servant, the driver, being the effective cause of the damage (see *Englehart* v. *Farrant & Co.*, [1897] 1 Q. B. 240). In such cases, whether the original negligence of the servant is the proximate cause of the damage is, of course, a question of fact in each case. See also as to the liability for the acts of a servant resulting in personal injury through the intervening acts of third parties, *Murphy* v. *The Great Northern Rwy. Co.*, [1897] 2 Ir. Rep. Q. B. 301.

A corporation is, as a rule, in the same position as regards liability for the tortious acts or fraud of a servant as a private individual. It has been held that a corporate body appointed by statute for public purposes, such as the trustees of the Mersey Docks, with power to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damage sustained through the default of their servants or agents to the same extent as absolute owners levying tolls for their own profit, although there is no improper conduct on the part of such corporate body (see *The Mersey Docks and Harbour Board* v. *Gibbs*, 1866, 35 L. J. Ex. 225).

This principle of the liability of a master for the wrongful acts of his servant done in the course of his employment and for the master's benefit, is a principle of the law of agency, not merely of the law of torts, and is equally applicable whether the agency is for a corporation in a matter within the scope of the corporate powers or for an individual (see per Lord Selborne, *Houldsworth* v. *City of Glasgow Bank*, 1880, 5 App. Cas. (H. L.) at p. 326; see also PRINCIPAL AND AGENT).

When a person is acting as a public officer on behalf of the Government he is not responsible for the neglect or misconduct of a servant, although such servant may have been appointed by himself (see per Lord Wensleydale, *Mersey Docks Trustees and Harbour Board* v. *Gibbs*, 1865, L. R. 1 H. L. at p. 124; see also *Lane* v. *Cotton*, 1701, 12 Mod. 172; *Whitfield* v. *Lord Le Despencer*, 1778, 2 Cowp. 754; *Nicholson* v. *Mounsey*, 1812, 15 East, 384). Nor can a telegraph company be made liable in damages for the negligence of a clerk in their employ in wrongly transmitting a telegram (see *Dixon* v. *Reuter's Telegraph Co.*, 1877, 46 L. J. Q. B. 197).

Master's Liability for Criminal Acts of Servant.—As a rule, an individual is only responsible for criminal acts which he has himself committed, which were committed by his direction or incitement, or the commission of which he has aided or abetted. A man cannot be guilty by his agent of an illegal act, or be held responsible for it, unless he has given his agent authority, express or implied, to do that illegal act (see per Lord Wensleydale, *Cooper* v. *Slade*, 1858, 6 H. L. at p. 793).

But the relation of master and servant in some cases and to some extent entails on the master a liability for criminal acts done by his servant.

As we have already seen, a master may be liable to civil proceedings in respect of the acts of his servant committed in the course of his employment, and for his master's benefit, although such acts amount to crimes. A

master may thus be liable to an action in respect of fraud (see *Barwick* v. *English Joint-Stock Bank*, 1867, L. R. 2 Ex. 259), or an assault (see *Smith* v. *North Metropolitan Tramways Co.*, 1891, 7 T. L. R. 459; *Dyer* v. *Munday*, [1895] 1 Q. B. 742) committed by his servant.

Moreover, in some cases a master is under a criminal responsibility for the acts of his servant. When, for instance, a master directs his servant to do a criminal act he, in accordance with the ordinary principles of criminal responsibility, becomes criminally liable for that act; the servant in such case is also criminally liable, unless the act be such that he was unaware of its illegal or criminal nature. So where a master, knowing that goods have been stolen, directs his servant to receive them into his premises, and the servant, knowing that they had been stolen, does so in pursuance of that direction, the master and servant may be jointly indicted for receiving stolen goods (see *R.* v. *Parr and Others*, 1841, 2 Moo. & R. 346). If, however, a man does, by means of an innocent agent, an act which amounts to a crime, the employer and not the agent is accountable for that act (see *R.* v. *Bleasdale*, 1848, 2 Car. & Kir. 765).

Again, under some circumstances a master may be under a criminal responsibility for the acts of his servant done within the scope of his employment, though the master, so far from having directed the act, was unaware of its commission, and though the act was contrary to his orders (see *Collman* v. *Mills*, 1896, 13 T. L. R. 122). So a master was formerly held to be criminally liable for a libel published by a servant in the course of his employment, although he was ignorant of its publication (see *R.* v. *Almon*, 1770, 5 Burr. 2686; *R.* v. *Walter*, 1800, 3 Esp. 21). It is now, however, provided by statute that where, at a criminal trial for libel, evidence has been given establishing a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to the defendant to prove that such publication was made without his authority, consent, or knowledge, and that the publication did not arise from want of due care and caution on his part (the Libel Act, 1843, 6 & 7 Vict. c. 96, s. 7). Where, on the trial of a criminal information for libel against the proprietors of a newspaper, it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that he had inserted the libel in question, without the knowledge or express authority of the defendants, it was held that the general authority given to the editor was not *per se* evidence that the defendants had authorised or consented to the publication of the libel within the meaning of sec. 7 of the Libel Act, 1843 (*R.* v. *Holbrook and Others*, 1878, 4 Q. B. D. 42).

A master may be indicted for a nuisance committed by his servant (see per Holt, C.J., *Tuberville* v. *Stampe*, 1697, 1 Raym. (Ld.) 264). The owner of works carried on for profit by his servants is liable to be indicted for a public nuisance caused by their acts in carrying on the works, though done by them without his knowledge and contrary to his general orders. So where workmen in the employ of the owner of a slate quarry obstruct the navigation of a river by throwing into it rubbish from the quarry, the owner of the quarry may be indicted for the public nuisance (see *R.* v. *Stephens*, 1866, L. R. 1 Q. B. 702). In that case it was said that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment (see per Blackburn, J., *ibid.* at

p. 710). And the directors of a gas company have, upon the same principle, been held to be answerable on indictment for acts, causing a nuisance, done by their superintendent and engineer, under a general authority to manage the works, though the directors were personally ignorant of the acts (see *R.* v. *Medley and Others*, 1834, 6 Car. & P. 292).

As to the responsibility of a master for the negligence of his servant who is in charge of a furnace which occasions a smoke nuisance, see *Chrisholm* v. *Doulton*, 1889, 22 Q. B. D. 736; *Niven* v. *Greaves*, 1890, 54 J. P. 548.

Several statutes also either expressly impose, or have been construed to impose, a penal liability on a master for certain offences committed by his servant, irrespective of whether he has authorised, or is even cognisant of, the commission of the offence. See, for example, the Bread Act, 1836, 6 & 7 Will. IV. c. 37, *R.* v. *Dixon*, 1814, 3 M. & S. 11; the Pharmacy Act, 1867, 31 & 32 Vict. c. 121, s. 17; the Pawnbrokers Act, 1872, 35 & 36 Vict. c. 93, s. 8; the Licensing Act, 1872, 35 & 36 Vict. c. 94, *Mullins* v. *Collins*, 1874, 43 L. J. M. C. 110, *Besley* v. *Davies*, 1876, 1 Q. B. D. 84, *Redgate* v. *Haynes*, 1876, *ibid.* 89, *Somerset* v. *Hart*, 1884, 12 Q. B. D. 360, *Cundy* v. *Le Cocq*, 1884, 13 Q. B. D. 207, *Bond* v. *Evans*, 1887, 21 Q. B. D. 249; the Food and Drugs Act, 1875, 38 & 39 Vict. c. 63, *Brown* v. *Foot*, 1892, 61 L. J. M. C. 160.

Notwithstanding these exceptions, however, the general rule still remains that a principal is not criminally answerable for the act of his agent (see per Blackburn, J., *R.* v. *Stephens*, 1866, L. R. 1 Q. B. at p. 710; see also *Massey* v. *Morris*, [1894] 2 Q. B. 412; and see the article PRINCIPAL AND AGENT).

SERVANT'S LIABILITY TO THIRD PARTIES.—*Servant's Liability on Contracts.*—When a servant contracts as an agent with the authority and on behalf of his master, he, the servant, is under no liability in respect of the contract. But where a servant contracts as principal, or where he assumes to contract on behalf of his master, when in fact he has no authority, or where, having authority from his master, he contracts in excess of that authority, he will be personally liable on the contract.

The liability of a servant to third persons with whom he enters into contracts on behalf of his master is determined by the ordinary principles of the law regulating the relation of principal and agent, as to which, see the article PRINCIPAL AND AGENT; see also the maxim *Respondeat superior* in the article MAXIMS, LEGAL.

Servant's Liability for Torts.—With regard to the liability of a servant to third persons in respect of tortious acts committed by him in the course of his employment, the principle has been laid down that in respect of acts of nonfeasance or negligence in the performance of duty a servant, as such, is under no liability, but in respect of acts of misfeasance he is liable (see *Lane* v. *Cotton*, 1701, 12 Mod. at p. 488).

A servant is responsible for his own fraudulent acts, and if he knowingly commit a fraud in the course of his master's business, he will be personally liable for it, even if it were authorised by his master, and this in addition to his master's liability (see *Cullen* v. *Thomson*, 1862, 6 L. T. 870).

A servant is liable also to be sued for conversion of the property of a third person, though such conversion was for his master's benefit. A person is guilty of conversion, even though he is merely a servant obeying his master's orders, if he intermeddles with and disposes of the property of another; and it is no answer that he acted under authority from some other

person, who himself had no authority to dispose of the property. So a clerk acting in ignorance was held liable for conversion (see *Stephens* v. *Elwall*, 1815, 4 M. & S. 259; *Alexander* v. *Southey*, 1821, 5 Barn. & Ald. 249; *M'Entire* v. *Potter*, 1889, 22 Q. B. D. 438). But a servant who has received goods from his master is not guilty of conversion when he merely gives a qualified refusal to deliver them up (see *Lee* v. *Robinson*, 1856, 25 L. J. C. P. 249). See further, the article CONVERSION, ACTION FOR.

CRIMES BY SERVANT.—As regards the criminal law, a servant is, of course, under the same responsibility for his acts as any other individual. There are, however, certain crimes which, being peculiarly connected with the relation of master and servant, should here be mentioned, but detailed information as to them will be found in the articles under their appropriate heads.

Larceny by a Servant.—Theft by a servant of his master's property technically differs from ordinary larceny. Theft by a servant is the felonious conversion by a servant without the consent of the owner of anything of which he has received the custody as servant of the owner; the possession as well as the ownership in such case being in the master. For instance, a carter who converts to his own use a cart which he is driving for his master is guilty of theft (*R.* v. *Robinson*, 1755, 2 East P. C. 565). So where the manager of a branch bank who has in his office a safe of which the bank manager keeps the key at the head office, and into which it is his, the branch manager's, duty to put the money received during the day, takes money out of the safe and applies it to his own purposes, he is guilty of theft (*R.* v. *Wright*, 1858, D. & B. 431). And it has been held that where a sheriff's officer in possession of goods under a writ of *fieri facias* sells part of them, it amounts to theft, as he is in the position of a servant (*R.* v. *Eastall*, 1822, 2 Russ. 250).

Larceny by a servant is more severely punished than ordinary larceny. A clerk or servant, or a person employed in the capacity of a clerk or servant, who steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, is guilty of felony, and liable on conviction to a maximum punishment of fourteen years' penal servitude (see the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 67).

Embezzlement.—When a clerk or servant or person employed in the capacity of a clerk or servant commits theft by converting any property delivered to or received or taken into possession by him for or in the name or on account of his master or employer, his offence is termed embezzlement (see the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 68). The distinction between embezzlement by a clerk and servant and other kinds of theft is that in other kinds of theft the property stolen is taken out of the possession of the owner, whereas in embezzlement by a clerk or servant the property embezzled is converted by the offender whilst it is in the offender's possession on account of his master, and before that possession has been changed into a mere custody (see Stephen, *Digest of Criminal Law*, 5th ed., 1894, art. 337). As to the persons who have been held to be within the category of clerks or servants for the purposes of conviction for embezzlement, see *ante*, under the head *Meaning of Master and Servant*. See further as to the offence and punishment of embezzlement, the article EMBEZZLEMENT.

Misappropriation of Master's Corn, etc.—A servant who, contrary to the orders of his master, takes from his possession any corn or other food, for

the purpose of giving the same to any horse or other animal belonging to or in the possession of his master, is guilty of misdemeanour; the commission of such an offence does not now amount to larceny (see the Misappropriation by Servants Act, 1863, 26 & 27 Vict. c. 103, s. 1). Previously to that Act such an offence amounted to larceny (see *R.* v. *Morfit*, 1816, Russ. & R. 307).

Criminal Breaches of Contract of Service.—In some cases the breach of a contract of service will amount to a criminal act.

Thus a person who wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequence of his so doing will be to endanger human life, or cause serious bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanour, and is liable to a fine of £20 or to imprisonment for three months with hard labour (the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, s. 5).

A person is guilty of a misdemeanour and is liable to the same punishment who being employed by a municipal authority, or by any company or contractor upon whom is imposed by statute the duty, or who has otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority, company, or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water (*ibid.* s. 4).

Termination of the Contract of Hiring and Service.—*General Grounds for Dissolution.*—The termination of the contract of hiring and service may be effected by consent of the parties, by the death of either the master or the servant, in the case of a servant in the employment of a partnership by a change in or dissolution of the firm, by breach of the contract, as where the master refuses or puts it out of his own power to take the servant into his service according to the agreement, or where additional risk is imposed on the servant, by proper notice or, for certain causes, by dismissal of the servant without notice.

The grounds which will justify the discharge of a servant without notice are, generally, gross moral misconduct on the part of the servant, wilful disobedience to the lawful orders of his master, habitual neglect of his master's business, or such misconduct on the part of the servant as tends to seriously interfere with his master's business, or the incompetence of the servant for his work, arising either through ignorance or permanent disability from illness.

Bankruptcy does not, in the absence of express agreement to that effect, terminate a contract of hiring and service (see *Thomas* v. *Williams*, 1834, 1 Ad. & E. 685; as to the effect of bankruptcy on contracts of apprenticeship and articles of clerkship, see the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41).

Termination by Consent.—The relation of master and servant, as before observed, being merely contractual, a contract of hiring and service may, of course, be determined at any time by the consent of the parties.

It has been held that where a contract of yearly service is determined by consent of the master and of the servant in the middle of a quarter,

there is no contract necessarily implied for the payment of wages *pro ratâ*, though such an agreement may be inferred from the circumstances of the particular case (see *Thomas* v. *Williams*, 1834, cited *supra*; *Lamburn* v. *Cruden*, 1841, 2 Man. & G. 253).

Death.—The contract of hiring and service is dissolved by the death of the master or of the servant. In the relation of master and servant personal considerations are the foundation of the contract, hence the death of either party will terminate the relation (see *Farrow* v. *Wilson*, 1869, L. R. 4 C. P. 744). So a contract of apprenticeship is dissolved by the death of one of the parties (see *R.* v. *Chirk*, 1774, Burr. 782), unless the contrary is expressly provided for by the contract (see *Cooper* v. *Simmons*, 1862, 7 H. & N. 707). But although a contract for personal services, involving personal confidence, is put an end to by the death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested. Where, therefore, a person employed as a consulting engineer for fifteen months to complete certain works for a salary payable quarterly, died before the work was finished, and whilst two quarterly instalments which were due to him were still unpaid, it was held that his personal representative was entitled to recover them (see *Stubbs* v. *The Holywell Ry. Co.*, 1867, L. R. 2 Ex. 311). As to the effect of continuance in the service of executors after the death of a master, see *Davison* v. *Reeves*, 1892, 8 T. L. R. 391.

Dissolution of Partnership, etc.—Where a person is under a contract of hiring and service with a firm of partners, the death of one of the partners will put an end to the contract of service, though the service was for a time certain, unless, indeed, the contract contains a contrary stipulation, and no action would lie against the surviving partners for not employing the plaintiff (see *Tasker* v. *Shepherd*, 1861, 6 H. & N. 575). A dissolution of partnership by the retirement of members of the firm is apparently not in itself a breach of a contract by the firm to employ a person in their service, though a dismissal by the surviving partners would be (see *Hobson* v. *Cowley*, 1858, 27 L. J. Ex. 205). But a dissolution of partnership may constitute a breach of an undertaking to teach a business contained in an agreement of apprenticeship (see *Couchman* v. *Sillar*, 1870, 22 L. T. 480; and see *Eaton* v. *Western*, 1882, 9 Q. B. D. 636). And a voluntary transfer of the business of the partnership by the firm to third parties will be a breach of a contract of hiring and service; for if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own accord to put an end to that state of circumstances under which alone the arrangement can be operative (see *Stirling* v. *Maitland and Boyd*, 1864, 5 B. & S. 840; see also *Cook* v. *Sherwood*, 1863, 3 F. & F. 729). In a recent case it was held by the Court of Appeal (Esher, M. R., *dissentiente*) that a dissolution of partnership by the retirement of a partner would in the case of a contract of service for a specified term operate as a wrongful dismissal (*Bruce* v. *Calder and Others*, [1895] 2 Q. B. 253), though in such a case if the continuing partners are willing to keep the plaintiff in their service he would be entitled merely to nominal damages (*ibid.*). On the other hand, a servant or agent paid by commission on the profits of his employer's business, and engaged for a certain time, has no right of action if his employer gives up or parts with the business before the expiration of that time; for if two parties agree for a fixed period the one to employ the other as his sole agent in a certain

business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named (see *Rhodes* v. *Forwood*, 1876, 1 App. Cas. (H. L.) 256). In the case of servants in the employ of a company, the appointment of a receiver or an order for the winding up of the company, when the business is not carried on after the order, will operate as a discharge of the servants (see *In re Oriental Bank Corporation, MacDowall's* case, 1886, 32 Ch. D. 366; *Reid* v. *The Explosives Co.*, 1887, 19 Q. B. D. 264).

Breach of Contract before Time for Performance.—When the contract of hiring and service has been entered into, an action in some cases may be brought in respect of a breach of it even before the time has arrived at which, under the contract, the services were to commence. Where, for example, the master has dispensed with the services, by actually refusing, or otherwise placing it beyond his power to carry out the contract, the servant is discharged from further responsibility, and may sue for damages for the breach of the contract, even before the time for its performance has arrived (see *Hochster* v. *De La Tour*, 1853, 2 El. & Bl. 678; the principle is also illustrated by *O'Neil* v. *Armstrong, Mitchell, & Co.*, [1895] 2 Q. B. 418).

Additional Risk.—Where after engagement a servant is subjected to additional risks beyond those agreed upon, he is entitled to leave the service and to claim wages. So where a seaman contracted with the master of a ship, which had been purchased in this country by the Japanese Government, to serve as one of the crew for the voyage for a fixed sum, and before she completed her voyage war was declared by Japan against China, it was held that, as the seaman would in the event of his continuing the voyage be exposed to greater risks than those he had contracted to run, he was justified in leaving the ship, and could recover the stipulated sum, notwithstanding that the voyage was not completed (*O'Neil* v. *Armstrong, Mitchell, & Co.*, [1895] 2 Q. B. 418).

Notice.—The contract of hiring and service may be dissolved by either party giving to the other due notice. What is sufficient notice to determine the contract depends in each case, in the absence of express stipulation, upon the nature of the service or employment.

Thus it is a well-settled rule that menial or domestic servants are entitled to one month's notice or to one month's wages in lieu of notice. In the case of domestic or menial servants, unless in the particular case a different custom be expressly proved, the hiring may be determined by either party on giving a month's notice or a month's wages (see *Beeston* v. *Collyer*, 1827, 4 Bing. at p. 313; *Fawcett* v. *Cash*, 1834, 5 Barn. & Adol. at p. 908; *Nowlan* v. *Ablett*, 1835, 2 C. M. & R. 54); and if the servant be dismissed without due cause, and without a month's notice, he will be entitled to a month's wages, in addition to any wages that may be in arrear (see *Robinson* v. *Hindman*, 1801, 3 Esp. 235). In such cases the claim must be for wrongful dismissal, not for work and labour (see *Smith* v. *Hayward*, 1837, 7 Ad. & E. 544; *Fewings* v. *Tisdal*, 1847, 1 Ex. 295).

It has been held that a custom with regard to the hiring of domestic servants to the effect that, in the absence of special contract, there is a right on the part of either master or servant to determine the service at the end of the first calendar month by giving notice at

or before the expiration of the first fortnight, is not unreasonable, and, therefore, if its existence be proved in any particular case the Court will enforce it. But the custom is not such that the Court will take judicial notice of it; in any case in which such a custom is relied on, it must be clearly proved by the evidence (see *Moult* v. *Halliday*, [1898] 1 Q. B. 125).

There appears to be no settled rule as to the length of notice to which a person engaged on a general or yearly hiring as a clerk, or in other positions superior to that of a domestic servant, is entitled, in the absence of express stipulation. The principle is that in the absence of custom or special agreement, such a person is entitled to reasonable notice before the expiration of the current year of service (see *Fawcett* v. *Cash*, 1834, 5 Barn. & Adol. 904; *Williams* v. *Byrne*, 1837, 7 Ad. & E. 177; *Lowe* v. *Walter*, 1892, 8 T. L. R. 358). What is a reasonable notice depends in each case upon the grade of employment.

For instance, persons employed as clerks are usually held to be entitled to three months' notice (see per Pollock, C.B., *Fairman* v. *Oakford*, 1860, 5 H. & N. at p. 636). So a governess (*Todd* v. *Kellage*, 1852, 22 L. J. Ex. 1), a schoolmistress (*Pottle* v. *Sharp*, 1896, 65 L. J. Ch. 908), and a commercial traveller (*Brown* v. *Symons*, 1860, 29 L. J. C. P. 251) have in particular cases been held to be entitled to a similar notice. But persons engaged in editorial or literary work are usually considered to be entitled to six months' notice (see *Chamberlain* v. *Bennett*, 1892, 8 T. L. R. 234; *Lowe* v. *Walter*, 1892, *ibid.* 358), or may even by custom be entitled to twelve months' notice (*Brennan* v. *Gilbart-Smith*, 1892, *ibid.* 284).

It is a general rule of law, where the hiring is a yearly one it cannot be determined by either party before the expiration of the year, though that rule is subject to exception in cases in which there is either an express stipulation, or one is implied by a custom in the particular trade to determine the hiring by a three months' notice (see per Grove, J., *Buckingham* v. *The Surrey and Hampstead Canal Co.*, 1882, 46 J. P. 774).

Dismissal without Notice.—Under some circumstances the dismissal of a servant without notice may be justified. The grounds which will justify such a dismissal have already been generally specified under the head of *General Grounds for Dissolution.*

Thus the serious moral misconduct of a servant will afford ground for his immediate discharge without notice (see *Atkin* v. *Acton*, 1830, 4 Car. & P. 208). The dishonesty of a servant, as where he is guilty of larceny or embezzlement (see *Cunningham* v. *Fonblanque*, 1833, 6 Car. & P. 44; *Spotswood* v. *Barrow*, 1850, 5 Ex. 110), would justify dismissal without notice. So also would the servant's habitual intoxication (see *Spark* v. *Phillips*, 1839, 5 Mee. & W. 279), violent conduct on his part (see *Shaw* v. *Chairitie*, 1850, 3 Car. & Kir. 21), or continual insolence; but an isolated act of insolence would not be a good ground for dismissal unless the insolence were such as to be incompatible with the continuance of the employment (see *Edwards* v. *Levy*, 1860, 2 F. & F. 94).

Wilful disobedience to lawful orders is a good ground for dismissal. A master is entitled to discharge a servant without any notice, where the servant has been guilty of deliberate disobedience to lawful orders (see *Spain* v. *Arnott*, 1817, 2 Stark. 256; *Turner* v. *Mason*, 1845, 14 Mee. & W. 112; *Lilley* v. *Elwin*, 1848, 11 Q. B. 742; *Churchward* v. *Chambers*, 1860, 2 F. & F. 229).

Disobedience to the master's orders will legally justify dismissal with-

out notice, even if the servant had reasonable ground for so acting; as, for instance, where a servant went out without leave to visit a dying parent (see *Turner* v. *Mason*, 1845, cited *supra*). But discharge without notice cannot be justified by a single and trifling act of disobedience (see *Callo* v. *Brouncker*, 1831, 4 Car. & P. 518).

The habitual neglect by a servant of his duties or any misconduct by him which is prejudicial to his master's interests is cause for dismissal (see *Robinson* v. *Hindman*, 1801, 3 Esp. 235; *Callo* v. *Brouncker*, 1831, 4 Car. & P. 518; *Amor* v. *Fearon*, 1839, 9 Ad. & E. 548). But an isolated instance of negligence would not be good ground for dismissal (see *Edwards* v. *Levy*, 1860, 2 F. & F. 94).

Speculation for many years and to a large extent in "differences" on the Stock Exchange by a clerk employed by a firm for foreign correspondence, was held to be such misconduct as to make his dismissal by his employers justifiable, on the ground that it was incompatible with the proper performance of his duties (*Pearce* v. *Foster*, 1886, 17 Q. B. D. 536). Misconduct of a servant may be a good ground for dismissal, although not discovered until after the servant was dismissed. So where a managing director of a company had been dismissed, the company brought an action against him, alleging misconduct and claiming damages, and he counterclaimed for damages for wrongful dismissal. After the commencement of the action, the company discovered that he had received a commission from a firm of shipbuilders on the price of fishing-smacks built for the company. It was held that the receipt of the commission entitled the company to dismiss him, and they were therefore not liable for damages, although in fact they had dismissed him on other grounds which they had failed to prove (*Boston Deep Sea Fishing Co.* v. *Ansell*, 1888, 39 Ch. D. 339; see also *Ridgway* v. *The Hungerford Market Co.*, 1835, 3 Ad. & E. 171; *Cussons* v. *Skinner*, 1843, 11 Mee. & W. 161).

A person who accepts employment which requires skill is held to warrant that he has the requisite degree of skill for the work in question: consequently, if from ignorance or incompetence he is unable to do the work he may be dismissed, even though the contract was for a specific term (see *Harmer* v. *Cornelius*, 1858, 5 C. B. N. S. 236). And permanent disability arising from illness is a good ground for dismissal, though the illness of a servant by which he is temporarily disabled from attending to his duties does not determine the contract of service, nor justify his dismissal without notice (see *R.* v. *Inhabitants of Winterslett*, 1783, Cald. 298; *Cuckson* v. *Stones*, 1859, 1 El. & El. 248; *Bettini* v. *Gye*, 1875, 1 Q. B. D. 183). A permanent disability, however, such as paralysis, would put an end to the contract (see *Cuckson* v. *Stones*, cited *supra*); but in such an event the servant would, unless the contract was for any specified term, be entitled to his wages for the time he had actually served (see *Bayley* v. *Rimmell*, 1836, 1 Mee. & W. 506). Under some circumstances, as in the case of an opera singer being unable to fulfil her engagements, even temporary illness would justify the rescission of the contract, and the appointment of another person to take the place of the person incapacitated (see *Poussard* v. *Spiers & Pond*, 1876, 1 Q. B. D. 410). And a servant may be discharged without notice for incompetence arising from habitual drunkenness (see *Speck* v. *Phillips*, 1839, 5 Mee. & W. at p. 281; *Wise* v. *Wilson*, 1845, 1 Car. & Kir. at p. 669; *Gordon* v. *Potter*, 1859, F. & F. 644).

Where a servant is for due cause properly dismissed by a master without notice, the servant will be entitled to wages up to the time at which the misconduct or other cause of dismissal took place, but not after that time

(see *Gordon* v. *Potter*, 1859, F. & F. at p. 645; see also *Robinson* v. *Hindman*, 1801, 3 Esp. 235).

Action for Wrongful Dismissal.—Where a servant is dismissed from service by his master without notice and in the absence of any of the causes above referred to which would justify a dismissal without notice, or where a servant is discharged with insufficient notice, he is entitled to bring an action against the master and to recover damages in respect of the wrongful dismissal. To support such action the servant must prove the existence and terms of the contract of hiring and service, but the mere fact of the service will afford a presumption of a contract of service.

With regard to the damages which are recoverable for a wrongful dismissal, the ordinary rules as to damages in cases of breach of contract are applicable (see DAMAGES). A servant is therefore entitled to recover for all damage flowing naturally from the breach (see *Maw* v. *Jones*, 1890, 25 Q. B. D. 107). It should be observed that the servant will not, as a general rule, be entitled to recover the full wages or salary for the whole of the unexpired period of the contract of service: the probability of his obtaining other employment during that period is to be considered in reduction of the damages (see *Hartland* v. *The General Exchange Bank Ltd.*, 1866, 14 L. T. N. S. 863; see also *In re English Joint-Stock Bank, Yelland's* case, 1867, L. R. 4. Eq. 350).

Therefore only nominal damages are, as a rule, recoverable for the breach by an employer of a contract of hiring if the person hired could have at once obtained other employment of a precisely similar kind which a reasonable man would have accepted (see *Macdonnel* v. *Marston*, 1884, 1 C. & E. 281). But under some circumstances a person is entitled to substantial and not merely nominal damages for the breach of a contract for employment, even though it is not shown that his non-employment interfered with his obtaining another post (see *Bunning* v. *The Lyric Theatre Ltd.*, 1894, 71 L. T. 396; see also *Kemp* v. *Caddington School Board*, 1893, 9 T. L. R. 301).

See also APPRENTICE; APPRENTICE (SEA); COMBINATIONS; CONCILIATION; CONSPIRACY; EMPLOYERS AND WORKMEN; EMPLOYERS' LIABILITY; FACTORIES AND WORKSHOPS; LABOURER; TRADE UNION; TRUCK ACTS.

[*Authorities.*—Comyns, *Digest*, title "Master and Servant"; Bacon, *Abridgment*, title "Master and Servant and Apprentice"; Hertslet, *The Law relating to Master and Servant*, 1850; Smith, *A Treatise on the Law of Master and Servant*, 4th ed., 1885; Baylis, *The Rights, Duties, and Relations of Domestic Servants*, 5th ed., 1896; Eversley, *Law of Domestic Relations*, 2nd ed., 1896; Parkyn, *Law of Master and Servant*, 1897; Macdonell, *Law of Master and Servant*, 2nd ed., 1898.]

Master (of a Ship).—See SHIPMASTER.

Master of Reports and Entries—An officer who had a department in the Reports Office of the old Court of Chancery, and with whom were filed reports, decrees, orders, and other proceedings of the Court. An account was also kept by him of funds belonging to suitors. The office was abolished in 1855 (18 & 19 Vict. c. 134), and the Clerks of the Records

and Writs, who were placed in control of the Reports Office, afterwards performed the duties of the Master of Reports and Entries until the Reports Office (*q.v.*) was amalgamated with the Central Office of the Supreme Court (Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78)).

[*Authority.*—Grant, *Chancery Practice*, p. 31.]

Master of the Faculties.—The Master of the Faculties is the chief officer of the Archbishop of Canterbury in his Court of the Faculties, which, however, "holdeth no plea of controversie" (Coke, *Inst.* iv. p. 337).

Its function is to grant dispensations, faculties, licences, etc., as provided by the Statute 25 Hen. VIII. c. 21, whereby authority is given to the archbishop and his successors to grant such dispensations, etc., by himself, or his sufficient and substantial commissary or deputy, for any such matter whereof theretofore such dispensations, etc., then had been accustomed to be had at the See of Rome, or by authority thereof.

The most important exercise of these powers now is in regard to the appointment of notaries (*q.v.*) and the granting of special licences of marriage.

The holders of the office down to the passing of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), were usually the deans of the Arches Court; but by that Act (s. 7) it was provided that whenever a vacancy should occur in the office of Master of the Faculties to the Archbishop of Canterbury, the judge of the Provincial Courts of Canterbury and York, created under that Act, should become *ex officio* Master of the Faculties; and this union of the offices has since taken place.

See FACULTY; LICENCE (MARRIAGE); NOTARY PUBLIC.

[*Authorities.*—Phillimore, *Eccl. Law*, 2nd ed., vol. ii. p. 945; Cripps, *Church and Clergy*, 6th ed., p. 626.]

Master of the Horse.—The department of the Master of the Horse is one of those constituting the sovereign's household, and the Master is a political officer, changing with the changes of Government. He is third in rank at court after the Lord Steward (*q.v.*) and Lord Chamberlain (*q.v.*), and is always one of the greater nobility. He has the Royal stables, stud, and kennels, etc., under his management and care, and the administration of the revenue granted for his department. On occasions of State and Royal processions he is in immediate attendance on the sovereign, and may ride in the same carriage. The actual management of the Royal stables and stud is in the hands of the chief or Crown equerry and secretary to the Master of the Horse, who is not a changing official. The department of the Master of the Buckhounds and of the hereditary Grand Falconer are subordinate to that of the Master of the Horse; the former changing with the change of Ministry. There are seven regular equerries, as well as extra and honorary equerries, all being officers of the army. One of them is always in attendance on the sovereign, and rides at the side of the Royal carriage.

The chief equerry retires with the Master of the Horse.

The Clerk Marshal has charge of the accounts before they are submitted to the Board of Green Cloth (*q.v.*).

[*Authorities.*—*Book of Dignities*, p. 301; art. "Royal Household," *Encycl. Brit.*; Anson, *Law and Custom of the Constitution*, 2nd ed., Pt. ii. p. 146.]

Master of the Rolls.—The Master of the Rolls, who is now one of the judges of the Court of Appeal, and the third in rank of the great legal officers of the Crown, was originally an officer of the Court of Chancery. By the Public Record Act (1 & 2 Vict. c. 94), or by a warrant in pursuance thereof, and subsequently by an Order in Council of 1852, all the records belonging to Her Majesty were placed under his charge and superintendence. (See RECORDS.)

His title of Custos Rotulorum, Keeper of the Rolls, Clerk of the Rolls of the Chancery, or Master of the Rolls, by which he is variously named in the earlier documents, was derived from his office as Keeper of the Records or Rolls of the Chancery, and he appears also to have been frequently styled the King's Vice-Chancellor of England. He was the highest in rank of the Masters in Chancery (see MASTERS OF THE SUPREME COURT), and the Chancellor's principal subordinate. His office is as old as the Court itself, and he was appointed by the Crown by patent for life, and sworn before the king himself in Council, or in the presence of Lords of the Council. He was also one of the General Conservators of the Peace by his office. At the king's coronation he had anciently the right, which he still retains, of being placed amongst the judges, and between the two chief of them; and by a decree of the tenth year of James I., which may be reckoned as a supplement or appendix to the Statute of Precedence of 31 Hen. VIII., he ranks, along with other of the judges, before the younger sons of viscounts and barons, and before all baronets.

From the earliest times he sat as a judge in the Court of Chancery exercising jurisdiction both on the common law and the equity side. Whether he thus sat exercising an original jurisdiction by virtue of his office, or whether he only sat by virtue of commissions, or by delegation from the Chancellor authorising him to hear causes and make orders, gave rise to much controversy until the passing of the Act 3 Geo. III. c. 30 in 1730 for settling the authority of the Master of the Rolls. In reply to attacks upon the extent of his jurisdiction, and charges against Jekyll, M. R., that he had usurped powers, and assumed to act alone in cases where he was not entitled to act without joining with him other Masters, several books were written, one of which, *Discourse on the Judicial Authority of the Master of the Rolls*, published anonymously in 1728, was written by the Attorney-General Yorke, afterwards Lord Chancellor Hardwicke, although at the time it was ascribed to Jekyll, M. R. Lord Hardwicke contended that the Master of the Rolls was by virtue of his office a judge of the Court of Chancery, but in subordination to the Chancellor, both on the common law side and the Chancery side, his jurisdiction being exercised in the stead and in aid of the Chancellor. Whatever might be the doubts as to the source of his authority, he had become a regular judge of the Chancery, sitting to hear causes, and giving orders in the absence of the Lord Chancellor, by the reign of Henry VIII. As such, when sitting at the Rolls Chapel or in the Court in Rolls Yard, his decrees were subject to appeal to the Lord Chancellor. But he also sat as *locum tenens* for the Chancellor in the Chancery Court, either at Westminster or at Lincoln's Inn: and then his acts were of equal force with those of the Chancellor. In his former capacity he did not hear cases in lunacy (but see *ante*, p. 56) and bankruptcy; and it was not until 1833 that by the Court of Chancery Act (3 & 4 Will. IV. c. 94) he was enabled to hear demurrers, pleas, and motions filed in causes set down for hearing before him. The Act of 3 Geo. II. c. 30 had made no difference in this respect. It merely enacted that all orders and decrees made by the Master of the Rolls, except those only which, according to the course of

Chancery, ought only to be made by the Lord Chancellor, should be deemed valid orders and decrees of the Court of Chancery, subject to appeal to the Lord Chancellor, and so that they should not be enrolled till the same should be signed by the Lord Chancellor. It was not until Lord Eldon's retirement in 1827 that the Master of the Rolls, who had always acted on the theory that he was the deputy of the Chancellor, and therefore never sat when the Chancellor was sitting, ceased to sit only in the evenings (usually from 6 to 10), and began to hold his Court in the morning.

At the beginning of the reign of the present sovereign a salary of £7000 was paid to the Master of the Rolls in lieu of all fees; but by 14 & 15 Vict. c. 83, s. 18, it was reduced to £6000 per annum.

In other respects the office remained as above described until the Judicature Act, 1873 (36 & 37 Vict. c. 66), when the Master of the Rolls became a judge of the High Court of Justice. And by sec. 5 it was enacted that all persons to be thereafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, and their successors respectively should continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner respectively as theretofore. Sec. 16 (1) provided that there should be transferred to and vested in the High Court the jurisdiction of the Court of Chancery, as a common law Court as well as a Court of equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court. Among these jurisdictions was that relating to patents. In old times the Master of the Rolls had authority over all the officers whose duty it was to prepare, examine, and preserve the records of the Court of Chancery; and it was from this Court that the patent was issued. But though he had jurisdiction to order such alterations or amendments in the rolls as might be necessary to make them correct records, and though he had the custody of all the records except the patent itself, he had no other jurisdiction over patents. By the Patent Act of 1852 (15 & 16 Vict. c. 83), the Master of the Rolls was given the sole jurisdiction in Chancery over the Patent Register, and this jurisdiction so passed under the last-mentioned section to the High Court. The powers and duties of the Master of the Rolls in relation to solicitors (*q.v.*) exercised by him formerly in the Petty Bag Office according to the course of the common law, were also preserved by sec. 12 of the Judicature Act, 1883; and the Solicitors Act, 1888 (51 & 52 Vict. c. 65), which transferred the custody of the Roll of Solicitors to the Incorporated Law Society, provided (s. 5) that the Master of the Rolls should continue to have and exercise all the powers and jurisdictions with regard to all matters formerly done in the Petty Bag Office as if the Act had not been passed. By sec. 17 of the Judicature Act, 1873, it was provided that the jurisdiction of the Master of the Rolls in relation to records should not be transferred to the High Court.

The Judicature Act, 1875, constituted the Master of the Rolls an *ex officio* judge of the Court of Appeal. By that of 1881 he ceased to be a judge of the High Court, and became a judge of the Court of Appeal solely. The then Master of the Rolls was not to be required to act under any commission of assize, etc. The effect of this Act (s. 2), with the alteration made by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56), is that every Master thereafter appointed is under an obligation to go on circuit, etc.

See APPEALS; CHANCELLOR; CHANCERY DIVISION; MASTERS OF THE SUPREME COURT; PETTY BAG OFFICE; RECORD OFFICE; SOLICITOR.

[*Authorities.*—Lord Hardwicke, *Office of the Master of the Rolls*; Coke, *Institutes*, pl. iv. p. 95; *Legal Judicature in Chancery*; Comyns' *Digest*; Smith's *Chancery Practice*, 1845; Hayne's *Outlines of Equity*; Pollock and Maitland, *History of English Law*; Kerly, *History of Equity*.]

Master of the Temple.—The Master of the Temple was originally the superior of the Order of Knights Templars, one of the most powerful and splendid of all the heads of the great monastic bodies of the Middle Ages. The Order was dissolved in 1307, and its property, on which the Inner and Middle Temple now stand, was granted, after an interval of private ownership, to the Knights Hospitallers, to whom the Inns became tenants (see INNS OF COURT). Upon the property was the old Church of the Templars—now known as the Temple Church; and after the Hospitallers had been put into possession, the prior and chapter of that Order appointed the priest of the church with the old title of custos; and this priest had his diet in one or other of the halls of the two law societies, in the same way as the custodian priest of the Templars formerly had his diet in the hall of the Templars. He took his office, as did also two chaplains, under the authority of the prior and chapter, and without admission, institution, or induction.

The Templars had been exempted by a Papal Bull from episcopal jurisdiction, and the Temple Church has always so remained. In the Act 32 Hen. VIII., which dissolved the Order of the Hospital of St. John (the Knights Hospitallers), the custos was styled, quite incorrectly, the "Master of the Temple," but since then, in all the letters patent by which he has been appointed, this style has been continued. Upon appointment by the Crown he takes his place without admission, institution, or induction, as in ancient times.

The Crown reserved to itself the right of nomination, but did not set apart any revenues of the confiscated property for the support of the Master. Upon the grant of the lease from James I., under which the two Houses now hold their property, he reserved to the Crown the nomination and free disposition of the Master, or Keeper, of the House and Church of the Temple, when vacant. The two societies were to pay the Master in equal portions the annuity of £17, 6s. 8d. for ever, over and above £20 yearly to be paid by the Crown; and they were to set apart a convenient mansion and house near the church for the Master for his residence and habitation, it being to be maintained by him. His official residence, the Master's house, has been so provided by the Benchers. The Crown now pays £25 towards the salary, and the rest is paid by the Benchers of the two Inns in equal proportions.

The Master is expected to preach thirteen sermons in the year himself, and he is responsible for all the morning sermons when the church is open, either by appointing an assistant preacher, or by securing the services of a deputy; in either case remunerating the preacher from his own income.

See INNS OF COURT; TEMPLE.

[*Authorities.*—Addison, *The Knights Templars and Temple Church*; Baylis, *The Temple Church.*]

Masters in Lunacy.—See LUNACY.

Masters of the Supreme Court.—The officers of the Court who bear the style and title of "Masters of the Supreme Court" are those who in the Queen's Bench Division occupy the positions formerly held by the Masters of the Superior Courts of Common Law at Westminster, whilst in the Chancery Division the Masters discharge precisely the same duties as were until quite recently performed by the chief clerks to the several judges of that Division.

A. QUEEN'S BENCH DIVISION.

Origin of Jurisdiction.—The office of Master of the Courts of Queen's Bench, Common Pleas, and Exchequer was created in the year 1837. By sec. 3 of the Superior Courts (Officers) Act, 1837 (7 Will. IV. and 1 Vict. c. 30), it was provided that there should be in each of such Courts, to conduct the civil business thereof, five principal officers, and no more, to be called respectively the Masters of each of the said Courts. The appointment on any vacancy occurring was vested in the Lord Chief Justice or Lord Chief Baron of the Court in which such vacancy should occur, the persons qualified being barristers, pleaders, or attorneys of not less than five years' standing (s. 10).

By the Judges Chambers (Despatch of Business) Act, 1867 (30 & 31 Vict. c. 68), s. 1, it was enacted that a majority of the judges of the Superior Courts of Common Law at Westminster, such majority to include the two Chief Justices, or one of the Chief Justices and the Chief Baron, might from time to time make and publish general rules for empowering the Masters to transact any such business and to exercise any such authority and jurisdiction in respect of the same as by statute or by the rules and practice of the Court were transacted or exercised by a judge sitting at chambers, and as should be specified in any such rule, except in respect of matters relating to the liberty of the subject.

In accordance with the above provision by the Regulæ Generales of Michaelmas Term, 1867, directions were given as to the business to be disposed of by the Masters, the short effect of such rules being that the Masters were empowered to transact all business which any judge of the Common Law Courts sitting at chambers could transact, with certain specified exceptions.

By sec. 77 of the Judicature Act, 1873 (36 & 37 Vict. c. 36), the Masters were attached to the Supreme Court, their duties being regulated by Order 54 of the Rules of the Supreme Court, 1875.

Establishment of Central Office.—Under the provisions of the Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), the Central Office of the Supreme Court of Judicature was established, and various offices, including those of the Masters and Associates of the Queen's Bench, Common Pleas, and Exchequer Divisions, the Crown Office, Queen's Remembrancer's Office, and office of registrar of certificates of acknowledgment of deeds of married women, were concentrated in and amalgamated with the Central Office. Such Central Office was placed under the control and superintendence of officers who were to bear the title of "Masters of the Supreme Court." The first Masters were the following:—

The existing Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions.

The existing Queen's Coroner and Attorney.

The existing Master of the Crown Offices.

The existing record and writ clerks.

The existing Associates in the Queen's Bench, Common Pleas, and Exchequer Divisions.

The patronage, which by sec. 9 (1) was vested in the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer by rotation, is now by virtue of sec. 19 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), vested in the Lord Chancellor, the Lord Chief Justice of England, and the Master of the Rolls in rotation, or in such order or manner as they by agreement amongst themselves may determine.

The qualification of Masters of the Supreme Court is the same as under the Superior Courts (Officers) Act, 1837.

By Order 60, r. 3, of the Rules of the Supreme Court, 1883, it is provided that the office of Master of the Supreme Court shall be deemed to be substituted for the several offices specified in the first part of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879; and all enactments and documents referring to any of those offices or to any of the persons holding them shall, unless the context otherwise requires, be construed and have effect accordingly.

Jurisdiction under Rules of the Supreme Court.—The jurisdiction of the Masters in the Queen's Bench Division is regulated by the provisions of Order 54. By rule 12 it is provided that a Master may transact all such business and exercise all such authority and jurisdiction in respect of the same, as under the Judicature Act or Rules may be transacted or exercised by a judge at chambers, except in respect of certain specified proceedings and matters. The exceptions are as follows:—

(*a*) All matters relating to criminal proceedings or to the liberty of the subject;

(*b*) Granting leave for service out of the jurisdiction of a writ, or notice of a writ of summons;

(*c*) The removal of actions from one Division or judge to another Division or judge;

(*d*) The settlement of issues, except by consent;

(*e*) Appeals from district registrars;

(*f*) Prohibitions;

(*g*) Injunctions and other orders under subsec. 8 of sec. 25 of the Judicature Act, 1873;

(*h*) Awarding of costs, other than the costs of or relating to any proceeding before a Master, and other than costs which by the rules, or by the order of the Court or a judge, he is authorised to award;

(*i*) Reviewing taxation of costs;

(*k*) Orders absolute for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof;

(*l*) Acknowledgments of married women, or applications to dispense with the concurrence of a husband in a disposition by a married woman.

The effect of the above provision is well illustrated by the case of *In re Howell Thomas*, [1893] 1 Q. B. 670. In that case an application was made under sec. 8 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), to set aside an agreement between a solicitor and his client as to costs. The preliminary objection was taken that the Master had no jurisdiction to entertain the application, and that it could only be made in open Court in consequence of the express terms of the section. The Master overruled the objection, and his decision was affirmed by a judge at chambers, and afterwards on appeal by a Divisional Court. It was pointed out by Wills, J., that, inasmuch as the power given by the Act could be exercised by a single judge, the general jurisdiction of a single

judge to act for the Court was preserved by sec. 39 of the Judicature Act, 1873. That being so, the Master had power to make the order. Again, in *In re Donisthorpe and the Manchester, Sheffield, and Lincolnshire Rwy. Co.*, [1897] 1 Q. B. 671, it was held that the jurisdiction conferred by sec. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), is now by virtue of sec. 16 of the Judicature Act, 1873, vested in the judges of the High Court, and may therefore be exercised by a Master. Upon the same principle of construction it was held that a Master has jurisdiction under Order 58, r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal (*Oppert* v. *Beaumont*, 1887, 18 Q. B. D. 435).

A Master may exercise all the jurisdiction and powers conferred upon the Court or a judge by the Arbitration Act, 1889 (Order 54, r. 12 *a*).

Masters in Chambers.—Six Masters are selected to attend as Masters in chambers during each of the four sittings of the Court, and such six Masters, by arrangement amongst themselves before the first day of each sittings, select three of their number to sit every Monday, Wednesday, and Friday, the remaining three to sit on Tuesdays, Thursdays, and Saturdays throughout the sittings (Order 54, rr. 13, 14).

Every application to a Master at chambers must, at the time of hearing (unless any other Master's name has already been marked thereon), be marked by such Master with his name, and the cause or matter becomes thereafter assigned to such Master (Order 54, rr. 17, 18).

Every action in the Queen's Bench Division not proceeding in a district registry is assigned to one of the Masters of the Supreme Court, and all documents and proceedings therein must thereafter be marked with the name of the same Master, and every application or proceeding therein which has to be heard or dealt with by a Master, including taxation of costs, must be heard and dealt with by such Master (Order 5, r. 6).

Actions assigned to the Master may be transferred by the Lord Chief Justice of England to any other Master (Order 5, r. 7).

During absence from illness or any other urgent cause, or during a vacancy in the office of any Master to whom an action is assigned, or during vacation, any other Master may hear and dispose of any application on behalf or in place of such Master (Order 5, r. 8).

A Master may refer any matter to the judge (Order 54, r. 20).

Appeal from Master to Judge.—An appeal lies from any order or decision of a Master to a judge at chambers. Such appeal is either by indorsement in the summons by the Master at the request of any party, or by notice to attend before the judge without a fresh summons within four days after the decision complained of, or such further time as may be allowed by a judge or Master (Order 54, r. 21).

The second of the above methods is the most usual. A notice of appeal is prepared by the party appealing, entered in the judge's list, and a copy served on the other side. It has been held that the appeal is not in time unless the summons is made returnable within four days of the Master's decision (*Bell* v. *North Staffordshire Rwy. Co.*, 1879, 4 Q. B. D. 205), but the time may be extended where no judge is sitting within the four days (*Gibbons* v. *London Financial Association*, 1879, 4 C. P. D. 263); and see *Burke* v. *Rooney*, 1879, 4 C. P. D. 226, which decided that the time limited by a Master to do a particular act may be enlarged by a judge.

An appeal lies to a judge from the decision of a Master on a question of costs, for a Master is not comprised within the term "Court or a judge" in sec. 49 of the Judicature Act, 1873 (*Forster* v. *Edwards*, 1879, 48 L. J. C. P. 767).

An appeal from a Master's decision is no stay unless so ordered by a judge or Master (Order 54, r. 22).

Practice Masters.—It is the special duty of one of the Masters to be present at and control the business of the Central Office, and to give the necessary directions with respect to questions of practice and procedure relating to the business thereof. For this purpose the Masters are required to select five of their number, who are termed "Practice Masters," to discharge the duty in turn according to a rota to be fixed by themselves, and each of such Masters, according to his turn, discharges such duty daily for a period of not less than one month at a time (Order 61, r. 2). From time to time the Practice Masters issue directions on points of practice. Such directions have, however, no statutory authority. Thus, where the Practice Masters had issued a direction that writs of summons issued before the Judicature Act came into operation might be renewed without order, it was held that such a direction was *ultra vires*, as the renewal of all writs, whether issued before or after the Act, required an order for the purpose (*Hume* v. *Somerton*, 1890, 25 Q. B. D. 239). A Practice Master of the Queen's Bench Division has no jurisdiction in matters coming before the Chancery Division; and where a Master had allowed an informal affidavit to be filed, it was held by Kekewich, J., that this was irregular, and that the affidavit ought not to have been filed without an order of the Court (*In re Cloake*, 1891, 40 W. R. 74).

The Masters also have to tax costs, a sufficient number, not less than three, attending for that purpose each day, except in vacation, when only one attends (Order 61, r. 3).

The number of Masters contemplated by the Judicature (Officers) Act, 1879, was eighteen. This number was found excessive, and in 1887 a committee, presided over by Lord Coleridge, reported that not more than fifteen Masters were required.

At present the number is eleven, of whom the Senior Master performs the duties of the office of Queen's Remembrancer, whilst others of the body fill the offices of Registrar of Married Women's Acknowledgments, Queen's Coroner and Attorney, and Master of the Crown Office respectively.

B. Chancery Division.

Origin of Jurisdiction.—The title of Master of the Supreme Court has only very recently (1897) been conferred on the officials in the Chancery Division who are so styled. The change in title has in no way altered the nature of the duties which have to be discharged by such officers, nor their position with regard to the judges of the Chancery Division to whom they are respectively attached. It is necessary, therefore, to consider very briefly the origin of their jurisdiction.

Masters in Chancery.—In the Court of Chancery there were originally certain officers who were styled Masters in Ordinary. They were eleven in number, besides the Master of the Rolls, who was the chief of them. The Accountant-General, who acted in all matters relating to the funds and effects of the suitors placed in the bank in his name and with his privity as directed by the decree or order of the Court, was one of the Masters. The rest of the body executed the orders of the Court upon references made to them. The office was one of great antiquity. The Masters were originally assistants or associates to the Chancellor and Master of the Rolls, and sat with them in Court by turns, usually two at a time. "They were formerly styled *Clerici de primâ formâ*, and were to be grave and ancient clerks, skilful and long experienced in the practice of the Court; and by

special appointment of Parliament these twelve clerks or Masters were made coadjutors with the Chancellor, and had equal authority with him in forming the *Brevia Magistraltia*, for unless they all agreed they were to go to Parliament; but in all other cases, by the constitution of the Court of Chancery, they are assistants or associates to the Chancellor and Master of the Rolls" (Harrison's *Accomplish'd Practiser*, p. 24).

Several instances are to be found in the books of the Masters sitting to hear causes debated (see, *e.g.*, *Merreitt* v. *Eastwicke*, 1684, 1 Vern. 264). Thus in the case of *Shapland* v. *Smith*, 1780, 1 Bro. C. C. 75, exceptions to a Master's report came on to be argued before Mr. Baron Eyre, sitting for the Lord Chancellor, with Masters Holfred and Hett. The latter differed in opinion with them, but Mr. Baron Eyre, doubting whether it was necessary that the opinion of the Masters sitting with a judge must concur with his, to found a decree, the cause stood over to be reheard by the Lord Chancellor. On the rehearing, the Lord Chancellor agreed with Master Hett, and allowed the exceptions.

In later times, however, the practice of the Masters sitting in Court was discontinued, and their duties were confined to the work transacted by them in chambers, some of such duties being purely ministerial and administrative, others being of a judicial character. For an account of the nature of the work which devolved upon the Masters in Chancery, see First Report of the Chancery Commissioners, 1852, pp. 26–34. The jurisdiction of the Masters was exercised without any reference to the judge, their conclusions being embodied in reports stating the result of the inquiries directed by the decree of the Court. After the report was made, the cause came on again for hearing, when the report was confirmed, unless any party was dissatisfied with the conclusions of the Master. In that event he could file exceptions to the report, and such exceptions were argued, and either allowed or disallowed. The procedure was excessively costly and cumbrous, and productive of great delay. The Commissioners advised the abolition of the office; and in accordance with that recommendation the office of Master in Ordinary was abolished by the Court of Chancery Act, 1852 (15 & 16 Vict. c. 80), s. 1, and it was provided that all or any of the powers, authorities, and jurisdiction given to the Masters in Ordinary by any Act or Acts in force on the first day of Michaelmas Term, 1852, might be exercised by the Master of the Rolls and Vice-Chancellors respectively.

By the same statute the Chancery judges were empowered and required to sit at chambers for the despatch of such part of the business of the Court as could conveniently be disposed of there (s. 11).

Appointment of Chief Clerks.—For the purpose of assisting in the general business of the Court, and the causes and matters belonging thereto, the Master of the Rolls and the Vice-Chancellors were each of them empowered to appoint two chief clerks to be attached to each such judge and his successors in office (s. 16); the qualification for the office being that the appointee should have been a practising solicitor or attorney for ten years at least immediately preceding his appointment (s. 17). By a subsequent statute (30 & 31 Vict. c. 87) the number of chief clerks for each judge was raised to three.

By sec. 77 of the Judicature Act, 1873, the chief clerks were transferred to the Supreme Court.

As has already been stated, the title of Masters of the Supreme Court was conferred on the chief clerks in 1897. The change was one of name merely, and the officers bearing the new title occupy precisely the same position towards their respective judges, and discharge precisely the same

duties as was the case previously. In passing, it may be noted that in the Rules of the Supreme Court under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 36), the Masters in the Chancery Division are called Chancery Masters. It is to be regretted that some such distinctive title was not conferred when it was determined to introduce the change in designation.

Jurisdiction under Rules of the Supreme Court.—The work to be transacted in chambers in the Chancery Division is regulated by the Rules of the Supreme Court, 1883, and in particular by Order 55. By rule 15 the judges of the Chancery Division to whom chambers are attached have power to order what matters shall be investigated by the Masters, and what matters shall be heard and investigated by themselves. Every Master has, for the purpose of proceedings before him, power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, to take affidavits and acknowledgments, and, when so directed by the judge, to examine parties and witnesses either upon interrogatories or *viva voce* (Order 55, r. 16). Parties and witnesses summoned to attend before a Master are liable to process of contempt for disobedience (Order 55, r. 17). It is not, however, usual for examination of witnesses to take place in chambers, such examination being usually held before one of the examiners of the Court (*In re Faure Electric Accumulator Co.*, 1888, W. N. 9; *M'Alister* v. *Walters*, 1890, 7 T. L. R. 105).

Nature of Jurisdiction.—The jurisdiction exercised by the Masters in the Chancery Division differs materially from that of their brethren in the Queen's Bench Division. The latter have an original jurisdiction, and an appeal lies from them to the judge. The Chancery Masters, on the other hand, are but deputies of their respective judges. Each Master performs his duties only as the hand of the judge (per Lord Cairns, *Powell* v. *Powell*, 1874, L. R. 10 Ch. 130). Every order, even though actually made by the Master, is in theory that of the judge, and is drawn up in his name. The Master should not be recognised in any order as having any independent position (*Powell* v. *Powell*, *ubi supra*). No appeal lies from the Master to the judge, but any party desiring it has an absolute right to insist on any point being adjourned to the judge to be dealt with by him in person (*In re Agriculturist Cattle Insurance Co.*, 1861, 3 De G., F. & J. 194; *In re London and County Assurance Co.*, 1857, 5 W. R. 794; *Upton* v. *Brown*, 1882, 20 Ch. D. 731; *In re Watts*, *Smith* v. *Watts*, 1882, 22 Ch. D. 5). On this point, however, a reasonable rule of practice has been established (at any rate in most of the chambers), under which a party loses his right of adjournment unless he insists on it at the time the application is heard, or reserves the right to ask for such adjournment within a short time. Failing this, an application would have to be made by motion to discharge the order. It results from this distinction between the jurisdiction exercised by the Masters in the Chancery and Queen's Bench Divisions respectively, that there is not the same restriction on the exercise of authority by the former as exists under Order 54, r. 12, in the case of the latter. Thus, whilst in the Queen's Bench Division a charging order absolute cannot be made by a Master, there is no rule requiring such an order to be made by a judge in the Chancery Division, and such an application can in that Division be entertained by the Master. Generally, it may be said that all applications which can properly be made in chambers can be dealt with by the Master, except where, either by express rule (as, *e.g.*, in cases within the proviso to Order 55, r. 15, or within r. 15 *a* of the same order), or by direction of the judge, or by request of the parties, or (as frequently happens) in the opinion of the Master himself, the decision of the judge in person is required.

It is beyond the scope of the present article to discuss in detail the various duties which devolve on the Masters in the Chancery Division. The reader is referred for information on this point to Daniell's *Chancery Practice*, and other similar authorities; and see CHAMBERS—CHANCERY DIVISION, in vol. ii. of the present work. Generally, however, it may be said that the business is of two kinds—that which arises in proceedings originated by writ, and that which results from matters of which the initial step is a summons, and as such originating in chambers. In the former case, the Master hears all applications before trial relating to pleadings, discovery, and the like, and works out inquiries directed at the hearing. In the case of proceedings originating in chambers, all steps, including the hearing, are for the most part in chambers, though, where special circumstances demand it, any point can be adjourned from chambers into Court.

Master's Certificate.—Although, as has already been shown, the Master in the Chancery Division is an impersonal officer, inasmuch as he does but act as deputy of the judge, yet there is one important particular in which what may be termed the personal jurisdiction of the Master is recognised. The answers to any accounts and inquiries directed by a judgment or order are embodied in a document which is termed the Master's Certificate, and which corresponds with the report under the old practice in the Master's office. Formerly the certificate was required to be approved by the judge, as well as to be signed by the Master; but the judge's approval is now no longer necessary (Order 55, r. 65). A certificate which answers all the accounts and inquiries is termed a *general* certificate, whilst one which deals only with all save one or more of them is known as a *separate* certificate.

Form of Certificate.—A certificate must not, except where the circumstances of the case require it, set out the judgment or order, or any documents or evidence, or reasons, but must refer to the judgment or order, and evidence or particular paragraphs thereof; so that it may appear upon what the result stated in the certificate is founded (Order 55, r. 66).

The certificate may in a proper case, upon direction of the Master, be prepared by the solicitor of one of the parties (Order 55, r. 66 *a*). In practice this rule is not largely acted on.

The certificate, after being prepared and settled in the presence of the parties, is signed by the Master (Order 55, r. 67). An appointment to sign need not be attended by the parties, as it is a purely formal matter (*In re Ingham, Lawe's Chemical Manure Co.* v. *Ingham*, 1896, 74 L. T. 21).

Where an account is directed by the judgment or order to be taken, the certificate must state the result, and refer to the account and specify by the numbers attached to the items which, if any, of such items have been disallowed or varied, and must also state what additions, if any, have been made by way of surcharge or otherwise. If necessary, a transcript may be required. The accounts and transcript, if any, must be filed with the certificate (Order 55, r. 68).

Summons to vary Certificate.—A certificate becomes binding, unless within eight clear days after the filing of it a summons to vary be taken out. Where, however, the certificate is to be acted on by the Paymaster-General without further order, or in the case of certificates on receivers' accounts, the time to apply to vary is two clear days after filing (Order 55, r. 70). The time for applying to vary a certificate runs in vacation (*Ware* v. *Watson*, 1855, 7 De G., M. & G. 739).

A party who has not applied to vary a certificate cannot be heard to dispute it (*Smith* v. *Armstrong*, 1856, 6 De G., M. & G. 150; *Lambe* v. *Orton*,

1859, 8 W. R. 111; *Leigh* v. *Turner*, 1866, 14 W. R. 361; *Aspinall* v. *Bourne*, 1861, 29 Beav. 462).

Where a summons to vary has been issued, it is, as a rule, adjourned into Court for argument, especially where further consideration has been reserved, in which case the summons will come on for hearing with such further consideration.

A party in the same interest with one who has taken out a summons to vary the certificate will not be heard (*Jacquet* v. *Jacquet*, 1859, 7 W. R. 543).

Under special circumstances, a certificate may be discharged or varied at any time after the same has become binding (Order 55, r. 71. See *Howell* v. *Keighley*, 1856, 8 De G., M. & G. 325; *In re Martin*, *Dier* v. *Martin*, 1884, W. N. 112). In *In re Dove*, *Bousfield* v. *Dove*, 1884, 27 Ch. D. 687, at the hearing on further consideration, the time for applying to vary the certificate was extended, but a summons was directed to be taken out *pro formâ*. Under the old practice, after the expiration of the eight days, special leave was required to apply to vary the certificate (*Briant* v. *Tiblut*, 1869, 17 W. R. 274).

Evidence not used in chambers will not, as a rule, be admitted on a summons to vary the certificate (*Fleming* v. *East*, 1854, Kay, App. lii.; *In re Hooper*, *Baylis* v. *Watkins*, 1863, 9 Jur. N. S. 570). The Court will not take into consideration evidence adduced at the hearing, to which no reference was made when the matter was before the Master in chambers (*In re Miller*, *Chapman* v. *Miller*, 1889, 60 L. T. 634). But where, on a summons to vary, fresh evidence was adduced, and the Court had before it complete material for the decision of the case, such fresh evidence was gone into, and the matter dealt with without being sent back to chambers (*In re Miller*, *ubi supra*).

Where an order is made varying the certificate, no physical alteration will be allowed in the certificate itself, but the variations will be embodied in an order (*Fox* v. *Bearblock*, 1882, 30 W. R. 342).

See CHAMBERS—CHANCERY DIVISION; CHAMBERS, JUDGES'; FURTHER CONSIDERATION; ORIGINATING SUMMONS.

[*Authorities.—The Annual Practice*, 1898; Archibald and Vizard on *Practice at Judges' Chambers*, 1886; Chitty's *Archbold's Practice*, 14th ed., 1885; Bennet's *Practice in the Masters' Office*, 1831; Daniell's *Chancery Practice*, 6th ed., 1884; Day's *Common Law Procedure Acts*, 4th ed., 1872; Grant's *Chancery Practice*, 1845; Harrison's *Accomplish'd Practiser in the High Court of Chancery*, 1741; Report of Chancery Commissioners, 1852; Seton's *Judgments and Orders*, 5th ed., 1891.]

Mate.—See SHIP'S MATE.

Material Alterations.—Where a bill of exchange is materially altered without the assent of all parties liable on the bill, the bill is avoided, except against the party who has himself made, authorised, or assented to the alteration, and subsequent indorsers, provided that where any material alteration which has been made is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor (Bills of Exchange Act, 1882, s. 64). See BILLS OF EXCHANGE and BANK NOTE.

Material alterations in a deed, see DEED, vol. iv. p. 174.

Presumption as to Date of Making.—Alterations in a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed; those in a will are presumed to have been made after its execution; while with regard to other writings there is no presumption as to the time they were made, except that it is presumed that the making of them did not constitute an offence (Stephen, *Digest of Law of Evidence*, ed. 1893, art. 89).

Material Evidence.—A plaintiff in an action for breach of promise of marriage is not entitled to recover unless his or her testimony is corroborated by some other "material evidence" in support of such promise. In *Bessela* v. *Stern*, 1877, 2 C. P. D. 265, it was held that the silence of the defendant, when taxed with having made a promise of marriage, was "material evidence" in support of the promise. In the later case of *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, it was decided that the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not "material evidence" in corroboration of the plaintiff's testimony. In that case, Bowen, L.J., said: "Silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."

Corroboration in some material particular is also required of the evidence of the mother in affiliation cases (Bastardy Laws Amendment Act, 1872), and of the unsworn evidence of a child in charges under the Criminal Law Amendment Act, 1885. See CORROBORATION.

Material Facts.—See PLEADING.

Material Men—Persons "whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind)" (Report by Sir Leoline Jenkins, given in his *Life*, vol. ii. p. 746, and quoted in *The Neptune*, 1834, 3 Hag. Adm. 142). For the lien of material men, see LIEN; MARITIME LIEN; NECESSARIES.

Material Particular. — See CORROBORATION; MATERIAL EVIDENCE.

Materials.—See TRUCK ACTS.

Materna.—*Ex parte materna*, see NEXT-OF-KIN.

Matricide.—See MURDER.

Matrimonial Causes — Causes relating to the rights of marriage, formerly cognisable in the Ecclesiastical Courts and now in the

Probate, Divorce, and Admiralty Division of the High Court of Justice. See DIVORCE; JACTITATION OF MARRIAGE; JUDICIAL SEPARATION; NULLITY OF MARRIAGE; RESTITUTION OF CONJUGAL RIGHTS.

Matrons, Jury of.—In two cases—the one criminal, the other civil—the question whether a given woman is with child or not is submitted to the decision of a jury of matrons or other "discreet women." In the first case, the use of this means of inquiry is obligatory and by the Court; in the second, optional and upon the petition of a private litigant. The procedure is of high antiquity, stated by Blackstone (4 *Com.* 395) to have prevailed, in pleas of the Crown, "as early as the first memorials of our laws will reach," and by Sir Lloyd Kenyon (*In re Bellett, infra cit.*) declared to be, as to its employment in civil suits, "coeval with the common law" itself. Its origin is either to be found in the analogy suggested by the ordinary trial by jury, and in the idea that a person should be tried by his (or her) peers, or with more probability in the practical reason that, in the matter to be decided, matrons were regarded, however mistakenly, as experts. In early ages, when medical knowledge was rare in amount and poor in quality, resort to a jury of matrons was, no doubt, the best and surest means of inquiry. Modern experience, however, does not justify the continued existence of a procedure which has often led to wrong results, and for which the medical profession furnishes a more easily available, as well as a more reliable, substitute.

I. *Jury of Matrons in Criminal Cases.*—In every capital case, where the culprit is a woman, upon a conviction and after sentence of death has been pronounced (see *R.* v. *Baynton*, 1702, 14 St. Tri. pp. 631, 632, 634), the clerk of the Court is to ask the prisoner, "What have you to say for yourself in stay of the execution of the sentence which has been given against you?" It is in answer to this question that the prisoner is to plead pregnancy, if she chooses to do so; and it would seem that in strictness the plea must be formally made (at whosesoever suggestion) by the prisoner herself, not by her counsel. In the case of *R.* v. *Hunt* (1847, 2 Cox C. C. 261) Erle, J., refused to allow Serjeant Ballantine to do for the prisoner what she had failed to do for herself; but as it afterwards appeared that she really was pregnant, she was at a subsequent session put to the bar again, and allowed to plead her condition. When a plea of pregnancy has been thus raised *ad retardationem executionis*, the clerk is to impannel forthwith *de circumstantibus*, from the bystanders present in Court, a jury of twelve matrons or (2 Hale, P. C. 412) "discreet women." The course usually followed is exemplified in *Wycherley's* case (1838, 8 Car. & P. 262); there Gurney, B., said, "Let all the doors be shut, and no one be suffered to leave the Court," that is to say, to prevent the ladies present as sight-seers from withdrawing, and so declining an unwelcome office. Too often an unseemly scene follows. *The Annual Register* (1872, pp. 3, 4, and see p. 200 of Chronicle), describing the trial of Christina Edmonds and her plea of pregnancy, says that "After about twenty minutes a dozen well-to-do and respectably-dressed women were captured and directed to enter the jury-box." The most recent instance (at the date of writing, March 1898) to be found in the Sessions Papers of the Central Criminal Court, is the case of *R.* v. *Katherine Webster*, which was concluded on July 8, 1879; the prisoner pleading pregnancy, but unavailingly (see Central Criminal Court Sessions Papers, vol. xc., Whetham, Mayor, 1879, vol. ii. p. 421; *The Times* of July 9, 1879). The latter occasion is said to have operated for a con-

siderable time in diminishing the average attendance of lady spectators at the proceedings of the Old Bailey.

The jury being now impannelled, the forewoman is first sworn separately and in some detail, and then the other jurywomen more shortly, to "search and try the prisoner at the bar whether she be with child, of a quick child or no" (Chitty, *Crim. Law*, vol. iv. pp. 443, 444; *Archbold*, 1893 ed., p. 207). A bailiff is then sworn to keep the jury "without meat," etc., according to the usual form with one exception; for the oath runs, "You shall not suffer any person but the prisoner to speak to them" (Chitty, *Crim. Law*, vol. iv. pp. 443, 444); and this variation would seem to show that the jury are not shut out from considering the woman's statements, if they seem worthy of credence. The jury withdraw with the prisoner to make their examination. But they may desire, and will be accorded, the testimony of a qualified medical man; and probably in these days such testimony would in practice be considered indispensable: in *Webster's* case (*supra cit.*) the verdict of the jury was given upon their own examination, and upon the evidence of Thyrza Belsham, one of the wardresses of Newgate, and Mr. Bond, the surgeon, who examined the prisoner. Were this not so, grave mistakes would occur, such as in the past have occurred; for "perhaps there is no subject on which average women display greater ignorance than on questions connected with pregnancy" (Tidy's *Legal Medicine*, 1883, Part II. p. 107). The books make mention of an early case where a mistake was made in this matter at Aylesbury (1 Hale, P. C. p. 369).

And in modern times mistakes have been made, *e.g.* in the *Norwich* case (*R.* v. *Wright*, 1832, *Medical Gazette*, vol. xii. p. 22; *Medical Times and Gazette*, Jan. 27, 1872, p. 98), in which a jury of matrons wrongly found a prisoner not with child. So in *Hunt's* case (1847, *supra cit.*) where a negative verdict was returned, the woman had actually at the time passed the period at which "quickening" usually takes place (see Taylor's *Medical Jurisprudence*, ii. p. 154), and the woman would have been executed but for the interference of the Secretary of State.

If medical evidence is called, the jury, it has been ruled, must return into Court and hear such testimony given publicly upon oath (per Gurney, B., in *R.* v. *Wycherley*, 1838, *ut supra cit.*). In strictness, the question to be decided is not whether the prisoner is or is not *priviment ensient* (*i.e.* barely with child: having conceived, "but not with quick child"; see Holthouse's *Law Dict.*), but whether or no she is *ensient de vive enfant* (Staundforde, *Plees del Coronc*, 198 C.); but, in practice, a jury of women will lean to mercy's side; for, says Hale, "I have rarely found but the compassion of their sex is gentle to them in their verdict, if there be any colour to support a sparing verdict" (2 P. C. 413). In the *Norwich* case (*R.* v. *Wright*, *ut supra cit.*), however, a jury of matrons negatived the plea, though the woman was in the fifth month of her pregnancy.

In *Wycherley's* case (*ut supra cit.*), Gurney, B., directed the surgeon (Mr. Grætorex) in these words: "'Quick with child' is having conceived. 'With quick child' is when the child has quickened. Do you understand the distinction I make?" It would seem that he ought not to have used "quick" but "barely" in the first sentence; for, as Hale (2 P. C. 412) says, "*Enseinture* is no cause to stay execution, unless she be *ensient* with a quick child, or which is all of one intendment, if she be *quick* with child." But, in truth, the language of the procedure, and the very procedure itself, are founded upon a physiological error long since rejected by scientific opinion (see the medical note to *Wycherley's* case, *supra cit.*). "The vulgar opinion," says Taylor (p. 155), "is that the fœtus only receives life when a woman

quickens. As ovum, embryo, or fœtus, however, the contents of the uterus are as much endowed with special and independent vitality in the earlier as in the later periods of gestation." That obscure change which, through error, is popularly known as "quickening," is nothing whatever to the purpose when the question is whether an individual existence can be attributed at the time to the child; yet the law has made this change the sole test by which a jury of matrons must determine if the unborn offspring can be regarded as having a separate life, and so separate rights, of its own. Moreover, "quickening" is an event not easily established except from the evidence of the woman herself, as indeed the form of charge given to the bailiff seems to recognise, and the period of quickening may occur at very varying periods, *e.g.* as early as the third, and so late as the sixth or even seventh month of pregnancy. The writers on medical jurisprudence, without exception, condemn both the procedure and the false physiological theory which underlies it. That the mistrust is felt by those who are responsible for carrying out the sentence of the law is clear; for even in *Wycherley's* case (*supra cit.*), where the verdict was supported by medical evidence, it was afterwards thought advisable to grant a respite. A review of all the recent cases appears in Dr. Stevenson's valuable edition of Taylor's *Medical Jurisprudence*. These cases show that juries of matrons are sometimes mistaken; and, further, that it is impossible to maintain the distinction between "barely with child" and "with quick child." In practice, pregnancy (when it is satisfactorily established) has been accepted as justifying a favourable verdict (see *R.* v. *Featherstone*, cited in Taylor's *Medical Jurisprudence*, vol. i. p. 155).

Supposing a verdict of "with quick child" to be returned, the consequences which follow from it remain to be considered; thereupon, the prisoner, as a matter of right and *ex necessitate legis*, is entitled to be reprieved, by the rule, found also in the civil law, *quod prægnantis mulieris damnatæ pœna differatur quoad pariat* (4 Black. *Com.* p. 395; Fleta, lib. c. 38; 3 *Inst.* 17). This reprieve is granted, not for the woman's own sake, but *in favorem prolis* (Chitty, *Crim. Law*, vol. i. pp. 759, 760). And it holds good, at all events, until either the woman shall have been delivered or proved by the course of nature not to have been with child. The better opinion seems to be that the reprieve is of force until the ensuing sessions, for it is matter of record (though *de facto* it may be entered merely upon a note of the agenda, 1 Hale, P. C. 369), and so the period of respite cannot be determined save by a new award of execution.

For though the prisoner may not have been pregnant in the first instant, she may in the meantime find herself in a state of real *enseinture*, and she may none the less plead her state as a ground of respite. But it has been said that if she has once, under reprieve, been delivered of a child, and afterwards become with child again, the plea of pregnancy will not avail her again, and the sentence of the law must proceed, regardless of her state, whether she be with quick child or not (Staundforde, *P. del C.* 198), and "the gaoler shall be punished for not looking better to her" (2 Hale, 413); the ground being that a woman ought not to be able to evade execution by her own incontinent and voluntary act.

This harsh view (if it be the right one) is "scarcely reconcilable with the humane principle which dictates the first reprieve" (Chitty, i. 759, 760), or with the rule *in favorem prolis*, and would probably not be enforced to-day.

The French law (Art. 127 of the Penal Code) is satisfied by medical evidence of pregnancy. The Revised Statutes of New York provide that the question of a female convict's pregnancy shall, in a capital case, be decided

by a jury of six qualified medical men. In England the judges and lawyers who prepared the Draft Code of the Criminal Code Bill Commission, 1879, provided (Art. 531) for the abolition of the jury of matrons, and the substitution in it for an examination of the prisoner by one or more registered medical practitioners, though the old erroneous terminology is retained.

II. *Jury of Matrons in Civil Cases.*—An inquisition by a jury of matrons is also the appointed means of deciding, under a writ *de ventre inspiciendo*, first, whether the woman named therein is with child or not, and, if she be found with child, secondly, at or about what date her delivery is to be expected.

The writ, which is in the Register (*Reg. Brev.* 1634, p. 227 *a*), but not in Fitzherbert (*Nat. Brev.*), is obtained by petition from the Court of Chancery, and is addressed to the sheriff; and after reciting an allegation of pregnancy and a possibility of fraud, it bids the sheriff to take with him certain "*discreti et legales milites et discretæ et legales mulieres*" (twelve of each became ultimately the fixed number), and visit the lady named in the writ, and to cause the "mulieres" to use their best endeavours to ascertain whether the allegation be true: if they find it true, they are also to state when the birth is likely to take place. The return is to be made to the Court of common law at Westminster, not to the Court of Chancery; and if the jury of matrons have found pregnancy, a second writ issues out of the Court of common law providing that the woman shall be guarded closely "*in castello*" during the period of her pregnancy. The procedure, which is of very ancient origin, was not infrequently used in the Middle Ages, and in nearer times is well known as having been copied in the course pursued at the trial of Lady Essex's nullity suit, when "six midwives of the best note and ten other noble ladies" were appointed *ad inquirendum et inspiciendum* (*The Countess of Essex's* case, 1613, *The State Trials*, vol. ii. 786). But perhaps few people are aware that there were several instances of the writ being granted in the last century, and that the right to invoke the protection which it provides against the chance of imposture was emphatically affirmed so recently as the year 1835.

The learning of the subject is in Coke upon Littleton (8 *b* and 123 *b*), and in the notes of Hargrave and Butler to be found appended to those sections in the reprint of 1832; but the modern cases seem to have escaped the notice of those eminent editors.

Various instances of the writ or of proceedings analogous will be found in Henry J. Bracton's *Note Book* (Professor F. W. Maitland's edition—cases 128, 137, 198, 1503, and 1605; and see *Joanna de Aldham's* case, 1219–1220, T. D. Hardy's edition of the Close Rolls, 4 Hen. III. vol. i. p. 435 *b*). The more modern cases are: *Willoughby's* case, 1597, Cro. (1) p. 566, and Moore (*La Dame Willoughbie's* case), 523; *Theaker's* (or *Duncombe's*) case, 1623, Cro. Jac. I. p. 686, and Win. 71; *The A.-G.* v. *La Roche*, 1723 (per Jekyll, M. R.), cited in the next; *Ex parte Ayscough* (or *Aiscough*), *In re Lady Chaplin*, 1730, Mos. p. 391, and 2 P. Wms. p. 591; *Ex parte Bateman*, at the Rolls (before Kenyon, M. R.), 1784, cited in the next case; *Ex parte Bellett* (or *Baron*), 1786, 1 Cox C. C. 297, and 2 Dick. 781: *Ex parte Wallop*, *In re Browne*, 1792, 4 Bro. C. C. 90, and 2 Dick. 767. The latest instance is *Ex parte Marston*, *In re Mrs. Ann Fox*, 1835, which was before Sir Lancelot Shadwell, V.C., and will be found reported in the *Times* (July 1, July 6, August 6, 1835; see also *The London Medical Gazette*, vol. xvi. p. 697, and xvii. p. 191). In the latter case, the Vice-Chancellor expressed his surprise that the writ *de ven. insp.* had not been swept away in the abolition of ancient proceedings effected by the Statute of 1833, 3 & 4 Will. iv. c. 27, s. 36. The cases cited will show that the right to the

writ is, under certain circumstances, practically absolute; on the other hand, they illustrate the praiseworthy efforts of the Courts to "accommodate," in Kenyon, M. R.'s, words (in *Ex parte Bellett*), the proceedings "to humanity," so far as is consistent with prudence.

[*Authorities.*—(*a*) *Legal*: Fleta, lib. i. cap. 38; Staundforde, *Les Plees del Corone*, 117 C., 198 C.; Coke, 3 *Inst.* 17; Hale, *Pleas of the Crown*, i. p. 369, ii. pp. 413, 414; 2 Hawkins, *Pleas of the Crown*, cap. 58, ss. 9, 10; *The State Trials*, vol. xiv. pp. 630, 631, 634; 4 Black. *Com.* p. 375; Chitty, *Criminal Law*, i. pp. 759, 760, iv. p. 443; Archbold, *Criminal Pleading*, 1893, 21st ed., pp. 206, 207. (*b*) *Medical*: Tidy, *Legal Medicine*, 1883, part ii. p. 107; Taylor, *Medical Jurisprudence*, 1883, 3rd ed. by Dr. T. Stevenson, pp. 153, 154; Luff, *Forensic Medicine*, 1893, p. 15; Dixon Mann, *Forensic Medicine*, 1893, p. 112; Hamilton and Godkin, *System of Legal Medicine*, 1895, p. 417; Guy and Ferrier, *Forensic Medicine*, 1895, p. 85.]

Matter (Cause or).—"Cause or matter" is a most comprehensive term. It includes every proceeding in the High Court of Justice. Every proceeding between a plaintiff and a defendant, and every criminal proceeding by the Crown, is a "cause"; and every proceeding in the High Court "not in a cause" is a "matter" (Judicature Act, 1873, s. 100). Hence the phrase "cause or matter" includes all—

1. *Actions.*—Any civil proceeding commenced by a writ or by an originating summons (*In re Fawsitt*, 1885, 30 Ch. D. 231) is an action. Indeed, an originating summons is now practically indistinguishable from a writ indorsed for trial without pleadings.

2. *Petitions, e.g.* in divorce or bankruptcy, or for revocation of a patent, or a proceeding under the Trustee Act, 1893 (Order 54 *b*, r. 2).

3. *Original motions, i.e.* motions not in an action; such as, a motion to set aside, remit, or enforce an award made on a voluntary submission, or a motion to strike a solicitor off the rolls.

4. *Special cases*, not in an action, *e.g.* a special case stated by justices, or by an arbitrator acting under a voluntary submission, or under Sir G. Turner's Act (13 & 14 Vict. c. 35; see *Forster* v. *Schlesinger*, 1886, 54 L. T. 51).

In the County Court, action means "every proceeding in the Court which may be commenced as prescribed by plaint," and matter "every proceeding in the Court which may be commenced as prescribed otherwise than by plaint" (County Courts Act, 1888, s. 186). If a proceeding can be taken in the County Court, and yet no method for commencing it is prescribed by the County Court rules for the time being, it is a "matter" within the above definition (*Lewis* v. *Owen*, [1894] 1 Q. B. 102).

Maturity—The date when a bill of exchange or promissory note falls due. See BILLS OF EXCHANGE; PROMISSORY NOTE.

Maundy Thursday.—The name (derived from the Latin *dies mandati*) commonly given to the Thursday before Easter, which in the Latin Church is also called *Cœna Domini*, in reference to the institution of the Holy Communion thereon. The day is a holy day appointed to be observed in the Church of England by proper lessons, Epistle, and Gospel, and on it the Lord High Almoner annually distributes to poor men

and women, on the sovereign's behalf, and with a religious service, a bounty known as the "Royal Maundy," a relic of the ceremonial washing of feet still observed by some foreign sovereigns, and, it is said, observed by those of England down to James II.

Mauritius—An island in the Indian Ocean, discovered by the Portuguese, and occupied in 1598 by the Dutch, who named it after Prince Maurice. Abandoned by the Dutch in 1712, it became in 1715 a dependency of the French Crown; from 1722 to 1767 it was administered by the Compagnie des Indes. During the French occupation Mauritius was known as the Isle of France. In 1810 it surrendered to the British troops, and in 1815 it was finally ceded to Great Britain. Mauritius, with its dependencies, now forms a British colony. Executive authority is exercised by the Governor, who is assisted by an Executive Council. The legislative authority of the island is the Council of Government, which now includes eight *ex officio*, nine nominated, and ten elected members. The Supreme Court was reconstituted by Order in Council of 23rd October 1851; it consists of a chief judge and two or more puisne judges. The laws of Mauritius are based on the French Codes, and French authorities may be cited to explain the meaning of the Codes (see *Her Majesty's Procureur* v. *Bruneau*, 1866, L. R. 1 P. C. 169). Local acts and regulations were collected in the Codes of Delaleu, Decaen, and Farquhar; a complete collection of the Laws of Mauritius, edited by Mr. Justice Rouillard, was published in 1866; a revised edition was published in 1887-96. In 1863 M. Piston began to report the decisions of the Supreme Court. From the Supreme Court there is an appeal to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL.

Of the dependencies of Mauritius the most important is the group of islands known as the Seychelles, which have an Executive Council, a Legislative Council, and a resident judge of their own. Among the lesser dependencies are Rodrigues, the Oil Islands, and the Solomon Islands.

[*Authorities.*—Prefaces to the editions of the Laws of Mauritius mentioned above; Colonial Office List.]

Maxims, Legal.

TABLE OF CONTENTS.

Authority of the Maxims . . . 285
Collections of 285
Construction of Deeds . . . 292
Contracts 287
Criminal Law 290
Custom 287
Deeds, Interpretation of . . . 292
Evidence 291
First or Fundamental Principles of Law 286
Forms 292
Fraud 289
Generally 284
Gifts 288
Husband and Wife . . . 293
Infancy 292
Interpretation of Deeds . . . 292
King, The 285
List of Maxims . . . 293
Nuisance 289
Office of a Judge . . . 286
Presumptions 292
Property 291
Subject-Matter of the Maxims . . 285
Torts 288

Law, like moral philosophy or politics, has its maxims which sum up in a pregnant sentence some leading principle or axiom of law, so called, says Coke, "quia maxima est ejus dignitas et certissima auctoritas atque quod maxime omnibus probetur." The merit of the maxim is two-

fold. It is a useful generalisation of law wherein every student who would become his gown may note, as Wingate says, how the same key opens many locks, or, to put it in another way, how all the cases are reducible to a few theses.[1] The other merit of the maxim lies in its epigrammatic form. The Latinised dress in which it generally appears is part of this epigrammatic form,—Latin more than any other language lending itself to point and brevity; and must not be taken to argue any derivation from the civil law, even if the Latinity of the maxim did not itself betray in most cases a mediæval and post-classical origin. Its brief and epigrammatic sententiousness has made the maxim at all times a favourite form of legal currency, tendered and accepted generally,—or, to take another metaphor, a portable armoury of legal weapons. The maxim has, however, the defects of its qualities. Brevity makes it—occasionally—obscure. It disguises—at times—a fallacy—"in generalibus latet error"; but it would be unfair to quarrel with the maxim for such reasons:—because it does not condense into a sentence the significance of a volume, or because it is apt at times to tyrannise over the mind. Nowhere more than in its maxims does the robust good sense of the common law of England display itself; and does not one of those very maxims warn the critic that no one ought to be wiser than the laws?—"neminem oportet legibus esse sapientiorem."

Authority of the Maxims.—The maxims of English law, like the rules of the common law, derive their source and sanction from an immemorial antiquity, from frequent judicial recognition, and from the *imprimatur* of the sages of our law. One writer, indeed—Wingate—has gone so far as to describe them as "prime emanations of the Eternal Wisdom."

The chief collections of legal maxims are that of Lord Bacon, 1596—"I hold every man a debtor to his profession," he says, and this was his way of paying his debt; that of Noy,—the legal confederate of Charles I. in levying ship money,—written originally in French (1641); of Wingate (1658); of Lofft—annexed to his Reports (1776); of Halkerson (1823); and, last, of Broom (6th ed., 1884).

Subject-Matter of Maxims.—Maxims touch, if they do not cover, the whole field of law—the theory of the king's sovereignty, the office of a judge, the first principles of law, public policy, marriage, infancy, crime, evidence, the interpretation of statutes and legal instruments, and many other matters; and their significance and completeness is brought into much clearer relief by grouping them round the several topics to which they relate, rather than by a bald alphabetical arrangement. First, then, of—

The King as supreme. The leading constitutional maxim on this subject is "Rex non debet esse sub homine sed sub Deo et sub lege, quod lex facit regem."[2] Hence no action will lie against the king. Hence, also, the corollary that "quod rex contra leges jubet pro injussu reputabitur," a maxim which, if remembered, would have saved some of our kings from manifold indiscretions. It is in this sense that the maxim "Rex non potest peccare," "the king can do no wrong," is to be understood. The mind of the king and of the law is the same. The king is nothing but the law in activity: "Rex nihil est quam lex agens," or, as Lord Bacon puts it, "anima legis"; and with this agrees the maxim, damning to despots, "Rex non est ubi voluntas dominatur." Another maxim emphasises this identity of king

[1] Lord Bacon puts it quaintly thus: "This delivering of knowledge in distinct and disjoined aphorisms doth leave the wit of man more free to turn and toss and to make use of that which is so delivered to more several purposes and applications."

[2] The version for which the adherents of prerogative have contended is "A Deo rex, a rege lex."

and law: "Rex omnes leges regni presumitur tenere in scrinio pectoris sui," locked in his bosom; and from this source the judges, as the king's vicegerents or delegates, derive not only their commission to administer justice, but their wisdom in the law. Perhaps this theory had better not be subjected to too close a scrutiny historically or critically. The judges may, however, very well be said to expound custom and moral rules as keepers of the king's conscience.

Office of a Judge.—On this subject there is quite a fasciculus of maxims. The first duty of a judge, as Lord Bacon says, is "to suppress torts and fraud." To this end the judge must be judicial, impartial: "odio et amore caveat judex"; if possible, a peacemaker: "Boni judicis est lites dirimere ne lis ex lite oritur" (sic): for "interest reipublicæ ut sint fines litium." It does not follow that it is the duty of judges to force compromises on the parties. His duty is "jus dicere, non dare," to declare, not make, the law; and though we have the recognised phrase "judge-made law," the law so called is—saving equity, perhaps—not truly judge-made, but only the judicial recognition of usage. Again, the judge must not be interested, "nemo debet esse judex in propria causâ." "Bonus judex," says another maxim, "secundum æquum et bonum judicat et æquitatem stricto juri præfert," a maxim which has now received statutory sanction in the Judicature Acts. The maxim that a judge should amplify his jurisdiction is not quite so unexceptionable, but "jurisdictionem" seems a corrupt reading for "justitiam." As to "audi alteram partem," there can be no two opinions, and most persons will agree "aucupia verborum judice indigna,"—quibbles are unworthy of a judge,—who should, as Lord Bacon says, be rather wise than witty; but as to what are quibbles, lawyers and laymen may differ. The maxim "judicis est judicare secundum allegata et probata" has been much relaxed by the modern system of pleading. Judicial discretion is well summed up in the saying, "Discretio est discernere per legem quid sit justum." It is not caprice. That the abuse of justice is worse than violence—"pejus est judicio quam per vim injuste facere"—is a maxim which no one has emphasised more strongly than Lord Bacon in his essay on Judicature, though he so lamentably failed to illustrate it in practice; and by its side may be put the aphorism—which the modern critic has wrested to his own purposes—"Judex damnatur cum nocens absolvitur."

First or Fundamental Principles of Law.—Among these, "salus reipublicæ suprema lex" claims the first place. This maxim, which stands in the forefront of the Twelve Tables, was the keystone of all the ancient polities; and though the individualism of Western freedom relaxed its vigour, it still maintains its authority as a summary of the public policy of our law, and seems daily gaining fresh strength from the socialistic tendencies of the age. All private rights of person and property are alike subject to this one supreme end—the welfare of the State. It is this which in old days legalised the press-gang, and still legalises conscription among foreign nations, which compels the parent to send his child to school, the ordinary citizen to sell his land for railway and waterworks' and gasworks' undertakings, to amend insanitary premises, to serve on juries, to let the vindication of public justice take precedence of his private remedy; it is this which forbids contracts in restraint of trade or in contravention of good morals, and all compounding of felonies, and in a hundred ways constrains private selfishness to serve or save the State, whether it be by sacrificing a gain—"beneficium privatorum non potest publico juri derogare"—or bearing a burden, "lex citius tolerare vult privatum damnum quam publicum malum."

Many of the maxims illustrating first principles of the law are on the

borderland between morals and positive law; but this is only what we might naturally expect, for the moral code is the broad base on which the smaller superstructure of positive law is erected. To take some examples of this: "Æquum et bonum est lex legum," equity and goodness is the law of laws; "lex injusta non est lex," "Veritas est justitiæ mater." If the law allows fictions, it is only in furtherance of justice.

"Vita reipublicæ pax, et anima libertas, et corpus, leges," is a maxim no less comprehensive than true: peace, that is to say, is the life of the State, liberty its mind, and the laws its body: that through which its liberty, its lawful energies—distinct from licence—find their free play: for the motto of English law is, and always has been, the same as that of Selden, "περὶ παντὸς τὴν ἐλευθερίαν." "Ratio est anima legis"—reason, good sense, is the soul of the law What a pregnant saying is this! Yet it is one which, however traduced by ignorant tongues, the judgments of our greatest judges have amply vindicated. With it may be coupled the maxim, "summa ratio est quæ pro religione facit," a maxim which enshrines the Christianity of the common law. There are many other typical maxims under this head.

"Argumentum ab auctoritate est fortissimum in lege," for instance, illustrates the conservatism of the law; "argumentum ab inconvenienti plurimum valet in lege," the practicality of the law; "de minimis non curat lex," the dignity of the law; "lex nihil frustra facit," the sagacity of the law; "misera est servitus ubi jus vagum aut incertum," the importance of certainty in the law, however defective it may be in reason; "lex non cogit ad impossibilia," the reasonableness of the law; "multa non vetat lex quæ tacite damnat," the high principle of the law; "jubens honesta et prohibens contraria; æquitas sequitur legem" (as the rudder the ship), the supremacy of the common law; and to all these excellences we may add what may perhaps surprise some persons to hear, the maxim that "the law favoureth the speeding of men's causes, and therefore hateth delay"; only "sicut natura non facit saltum, ita nec lex."

Custom.—"Optimus interpres rerum usus," "optimus interpres rerum consuetudo," are maxims highly characteristic of our law. They lie at the root of the common law, which is but universal custom, the reasonableness or convenience of which has been attested by experience—"consuetudo est altera lex"; and they have moulded the common law from age to age to meet the exigencies of an ever-changing state of society. Mercantile law furnishes an admirable illustration. It is nothing but the body of merchants' usages interpreted and approved by use, and systematised and sanctioned by law. On the same principle depends the maxim, "consuetudo loci est observanda." Local customs of husbandry, of fishery, of mining, or of trade have nearly always their origin and justification in experience: they are what practice has proved to be best suited to the particular locality.

Contracts.—The maxim "modus et conventus vincunt legem" affirms the first principle of contract. Thus if a house be blown down with the wind, the lessee is excused in waste; but if he have covenanted to repair it, then an action of covenant lies by the agreement of the parties. But the maxim is one which must be understood with qualification, a qualification expressed in two other maxims: "nullius charta legibus potest derogare," and "conventio privatorum non potest publico juri derogare." Freedom of contract, in other words, is circumscribed and limited by the requirements of public policy. There is nothing to prevent, for instance, a landowner, in granting the surface, stipulating that he shall not be liable for subsidence (*Rowbotham* v. *Wilson*, 1858, 8 El. & Bl. 150); or that time shall be of the essence of the contract, though it is not so by the general law (*Martindale*

v. *Smith*, 1841, 1 Q. B. 395). On the other hand, a clause in a company's articles providing that a shareholder shall not be entitled to present a petition without the sanction of the directors is void, for the Companies Act, 1862, gives him a statutory right to present such petition (*In re Peveril Gold Mines*, [1898] 1 Ch. 122; 67 L. J. Ch. 77). For the same reason, no contract can be maintained which is "contra bonos mores," tainted with immorality; for "omnis contractus turpitudinis legibus invisus." It is of the essence of a contract that it should be freely entered into—"nihil consensui tam contrarium est quam vis atque metus," force and fear.

The necessity of a consideration in English law to constitute a good contract is embodied in the familiar maxim, "ex nudo pacto non oritur actio," a maxim coeval in spirit, if not in form, with the bargaining instincts of human nature. "Caveat emptor," let the buyer beware, is another characteristic maxim deeply rooted in the independence of the Anglo-Saxon race,—a maxim equally applicable, as a recent case discovers (*Moss* v. *Moss*, [1897] Prob. 263; 66 L. J. P. 154), to the marriage contract as to the purchase of a horse or of a quarter of wheat.

Gifts.—Maxims as to gifts may be headed with the precept, "debitor non presumitur donare," or, in other words, "justitia prior liberalitati," a man must be just before he is generous. In gifts, as in other matters, secrecy is suspicious—"dona clandestina sunt semper suspiciosa"; that is why the law requires good evidence of a gift,—a deed or delivery. Some persons might suppose the maxims "nemo dat qui non habet," "nemo dat quod non habet," in the nature of superfluous truisms, but the lawyer conversant with the equitable doctrine of election knows that a man, through the artifices of that doctrine, can give away what, in fact, he does not possess.

Torts.—The law of wrongs or torts has gathered round it many maxims of cardinal importance. The chief of these, and most comprehensive, is "alterum non lædere." Accidental injury the law excuses (*Stanley* v. *Powell*, [1891] 1 Q. B. 86; 60 L. J. Q. B. 52); but an injury is not accidental because the doer of it does not intend to injure any particular individual, for a man is presumed to intend the natural and probable consequences of his action: if, for instance, he throws a lighted squib into a building full of people (*Scott* v. *Shepherd*, 1773, 2 Black. W. 892), or leaves a horse and cart unwatched in the street (*Lynch* v. *Nurdin*, 1841, 1 Q. B. 29). The test in these cases is, Would a reasonable man have foreseen the actual consequences as likely to happen? for though every man must be credited with common sense, it is an equally vital maxim of law that a man is not held liable indefinitely for all the consequences which the whirligig of chance may bring about, or an ingenious imagination conceive—"In jure non remota causa sed proxima spectatur."

A man cannot escape by using another as the instrument of his wrongdoing. This just principle, that a master is liable for the wrongful acts of his servants, is expressed in the maxims "qui facit per alium facit per se" and "respondeat superior," maxims founded on the principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another, and which has its analogue in the maxim of property, "sic utere tuo ut alienum non lædas" (*supra*). How much meaning, again, is condensed into the maxim derived from the civil law, "imperitia culpæ adnumeratur." "If a man," as Sir F. Pollock observes, "will drive a carriage, he is bound to have the ordinary competence of a coachman; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a

bricklayer." He undertakes for common skill in the craft; but necessity may excuse unskilfulness as well as other trespasses and wrongs—"Necessitas quod cogit defendit." Necessity can, however, be no excuse against the commonwealth, for "necessitas publica major quam privata." Persons in danger of shipwreck may, for instance, jettison other men's goods and not be answerable, but not ordnance or ammunition going to relieve any of the king's towns. So says Noy. The imperilled must act in the Roman spirit, "Necesse est ut eam, non ut vivam." In any case, the fear that prompts the act must be a well-grounded fear. The law requires a certain firmness in every man—"Vani timoris justa excusatio non est." The act of God, lightning, flood, storm, like *vis major*, is a species of necessity and "nemini facit injuriam," but even here the law does not relax the duty of due diligence (*R.* v. *Commissioners of Sewers for Essex*, 1885, 14 Q. B. D. 574; 53 L. J. Q. B. 574).

A maxim in this connection which has much exercised the minds of the Courts is "volenti non fit injuria," embodying the perfectly sound principle that a person cannot complain of an injury to which he has consented. This is daily illustrated in common life. It protects the surgeon who amputates a limb: the football player, boxer, or fencer, so long as they play fairly according to the rules of the game; and it prevents a person who chooses to pay a debt barred by the Statute of Limitations, or not enforceable by reason of infancy, from getting his money back (*Bize* v. *Dickson*, 1 T. R. 286, 287). The obscurity of the maxim lies in the word "volenti," the extent of the consent given. *Scienti* is not *volenti*, as Bowen, L.J., observed in a well-known case. It must also be received with this reservation, that no consent—no leave or licence—can legalise an unlawful act, *e.g.* procuring abortion, for instance. Consent in such a case means only a conspiracy to break the law.

Another maxim of the law of torts is, "actio personalis moritur cum personâ" (*q.v.*), a maxim whose history is coextensive with the history of English law.

"Culpa lata dolo æquiparatur" is a maxim which in substance the Court of Appeal accepted in *Peek* v. *Derry*, 1888, 37 Ch. D. 541; 57 L. J. Ch. 347—that directors making untrue statements without reasonable ground for believing them true was deceit; and though the House of Lords would not accept that statement of the existing law, the Legislature has now, in the Directors Liability Act, 1890, given effect to the spirit of the maxim.

Fraud.—"Fraus," saith the maxim, "est legibus invisissima," it avoids all acts, ecclesiastical and civil: and another maxim goes on to affirm "nihil calliditate stultius," which is only another mode of saying that honesty is the best policy; still it may be a little too optimistic to say "sub clypeo legis"—under the ægis of justice—"nemo decipitur"; for there is nothing to prevent a purchaser getting a bad title though the property is sold with the sanction of the Court. "Fraus est odiosa et non præsumenda" is a maxim highly characteristic of the fair spirit of English law, and may be commended to those who would treat directors as suspects against whom everything is to be presumed. A "suppressio veri" may be as much a fraud as a "suggestio falsi," but the maxim "aliud est celare, aliud tacere," marks a substantial distinction.

Nuisance.—In criticising in a well-known case—*Walter* v. *Selfe*, 1850, 4 De G. & Sm. 315—what makes a nuisance, Knight Bruce, L.J., asks, "Ought this inconvenience to be considered, in fact, as more than fanciful, more than one of mere delicacy or fastidiousness—as an inconvenience materially

interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" The maxim puts it in five words, "Lex non favet votis delicatorum."

Criminal Law.—The two maxims which may be said to constitute the chief pillars of our criminal law are "ignorantia juris neminem excusat," no man can plead ignorance of the law, and "omnis indemnatus pro innoxio legibus habetur," the law of England holds every man innocent until he is proved guilty. The first of these is a necessary assumption postulated by the exigencies of civil society. The law would be reduced to a state of impotency were it competent to anyone who has committed a crime to allege that he did not know it to be against law, and though the maxim is, in a sense, a fiction, it is not so contrary to natural justice because the prohibitions of the criminal law are in the main prohibitions which appeal to the moral sense of all mankind. And if the law makes presumptions of knowledge, it makes none of guilt. It requires guilt to be strictly proved in each particular case, nor does it esteem that as guilt which exists only in thought or intention—"cogitationis pœnam nemo patitur"; "in criminalibus voluntas pro facto non reputabitur," are the maxims which draw the broad distinction between law and ethics. Law, wisely keeping clear of casuistry—"nimia subtilitas in jure reprobatur"—ignores intent until it has manifested itself in some overt act against the individual or the State; but when once it has done so and the law is "seised" of the case, the state of mind of the wrong-doer, malice or not, the "mens rea," becomes an important element. This is expressed in the familiar maxim, "actus non facit reum, nisi mens sit rea."

The distinction between tort and crime is with us well marked In a rude age the two are hardly differentiated. Law-licensed revenge supplies a wild kind of justice until the State compels the injured party to accept a money compensation, and to leave the vindication of the law to the king as personifying the community. This transition is seen in the maxim "venia privatim læsi non sufficit legibus." The rules against compounding a felony or shifting a prosecution have the same source, and so too the rule which requires that public justice must first be satisfied before the injured party can pursue his civil remedy. The significance of these rules is plain. It deeply concerns the State as such that wrong-doing should not go unpunished—"interest reipublicæ ne maleficia remaneant impunita"; "pereat unus ne pereant omnes." Without this reign of law the world would, as Sydney Smith said, be nothing but a "wild waste of passion." To spare the guilty is a menace to the innocent: "Qui parcit nocentibus innocentibus minatur." But all punishment is by the theory of English law reformatory and deterrent, not retributive or vindictive. Hence the maxim "pœna ad paucos, metus ad omnes perveniat," punishment is awarded to inspire awe, and make the law a terror to evil-doers. A multitude of punishments, as a maxim says, are no less discreditable to the prince than many deaths to a doctor: "Nemo bis punitur pro eodem delicto" is a corollary from the above principles. Of drunkenness our law in theory holds a similar view to Solon. It aggravates crime: "omne crimen ebrietas et incendit et auget." (But see article DRUNKENNESS.) One maxim we receive respectfully, but not quite convinced—that the law respecteth life and liberty most and the person above his possessions, when interpreted, that is, in the light of the sentences passed respectively for ruffianly assault and stealing a purse. The First Offenders Act is the modern version of "principio obsistendum est."

Property and its Responsibilities.—Acquisitiveness is the mainspring of industry. Take away this incentive—

"untune this string,
And mark what discord follows."

It has ever therefore been the policy of the law to allow men to appropriate the fruits of their labour—lands, chattels, or choses in action—and to protect them in the enjoyment of such fruits; but to this the law makes certain exceptions which are enumerated in the maxim "aer, lux, aqua profluens, feræ, nulli propria, omnibus communia." Air, light, the blessing of the direct rays of the sun, flowing water, these are the free bounties of nature which selfishness may not monopolise; and how deeply the maxim as regards "feræ" has sunk into the popular mind is evidenced by the battle that has raged for centuries and still rages round game and the Game Laws; but the maxim must be read with that other maxim, which is the ground of the law of prescription and of easements, "possessio facit jus." The completeness of the landowner's right is embodied in the maxim "cujus est solum, ejus est usque ad cœlum," from the centre to the sky, so that even sailing over it in a balloon may be a trespass (*Kenyon* v. *Hart*, 1865, 6 B. & S. 249, 252). To this exclusiveness of possession may be added the maxim which contains the law of fixtures in a nutshell, "quicquid plantatur solo solo cedit," trees, buildings, machinery; and in this connection we may note another maxim of property, "Incidents cannot be severed." If a man grant wood, for instance, to be burnt in such a house the wood cannot be granted away, but he who has the house shall have the wood also. Perhaps the most famous of all our legal maxims is that which declares "every man's house to be his castle," "Sua cuique domus arx esto," with its complement, "nemo de domo suâ detrahi potest." In this time-honoured aphorism we have reflected a microcosm of the law of primitive society. In those rude early times when the homestead was an oasis of peace in the midst of a desert of lawlessness, and only less sacred than the precincts of the king's palace, "domus sua cuique tutissimum refugium" had a very real significance. The modern version has added "and the English woman's castle too," from which she may exclude even her husband (*Weldon* v. *De Bathe*, 1884, 14 Q. B. D. 339).

But if the rights of property are great so are its responsibilities, and these responsibilities cannot be summed up in a more comprehensive sentence than "sic utere tuo ut alienum non lædas." The latest illustration of this many-sided maxim will be found in *Ogston* v. *Aberdeen District Tramways Co.*, [1897] App. Cas. 111—a case of a tramway company clearing its line of snow by salt at the expense of a nuisance to the public.

Evidence.—The law does not accept the brilliant paradox that speech was given us to conceal our thoughts—brilliant paradoxes are seldom sound. Its maxim is "index animi sermo," words are the index of thought. This is by no means synonymous with saying that a man generally speaks the truth. His speech may discover the prevaricator and the perjurer, as well as the truth-telling witness, as the cross-examiner well knows. In consonance with this maxim is that other, "habemus optimum testem confitentem reum," yet confession is not conclusive. It may have been induced by threats or hope of benefit, and if it has been the law rejects it. Admissions, too, are jealously guarded, but admissions against interest may rightly be received; "for the law reputeth that a man will deal for his own best advantage, and therefore the law believeth against the party whatsoever is to his prejudice."

In all legal proceedings the burden of proof is on the plaintiff or prosecutor. This is expressed in the maxim "actori incumbit onus probandi," and with this may be coupled the maxim "nemo tenetur adversarium suum contra se armare." True, the defendant may be compelled to give discovery, but he is not compellable to disclose his evidence—to show his adversary his brief.

Consistently with its first principle of always requiring the best possible evidence, the law places peculiar reliance on the evidence of experts: "cuilibet in sua arte perito est credendum"; and this is undoubtedly in theory a sound principle, but in practice it cannot be said to work successfully, the tendency being for the expert to identify himself too much with the side for which he is called.

It is the same principle of the best evidence which has given birth to the maxim "plus valet oculatus testis unus quam auriti decem." The old rule of Anglo-Saxon procedure allowed nothing but the testimony of eye-witnesses.

Presumptions.—In its presumptions, again, the law discovers great discretion: "Nemo presumitur alienam posteritatem suæ prætulisse." Why? Because experience shows people do not: blood *is* thicker than water: "naturæ vis maxima chirographum apud debitorem repertum præsumitur solutum." Why? Because in such a case the note of hand usually *is* discharged; so the presumption "omnia rite acta," or "pater est quem nuptiæ demonstrant." It is upon grounds like this of what usually happens—"ordinem naturæ"—that the law bases its presumptions. This it is which gives them their strength, and inspires another maxim, "stabit presumptio donec probetur in contrarium."

Infancy.—The infant has been called the spoilt child of English law, and with good reason. "Meliorem conditionem suam facere potest minor, deteriorem nequaquam," or, put otherwise, "contractus infantis invalidus si in damnum sui spectet." Here we have the pith of the law of infancy. The infant alone is permitted by law to play fast and loose—to hold to a contract if beneficial, to disaffirm it if onerous. But the privilege of infancy—the plea of immature understanding—lies chiefly in the domain of contract. In tort or crime, "malitia supplet ætatem."

Forms.—The law, as St. Paul says of the Church, "requireth decency and order," and to this end nothing conduces more than well-settled forms, and inasmuch as "these formal and orderly parts," as Blackstone says, speaking of a deed, "are calculated to convey the meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity"; "minime mutanda sunt quæ certam habuerunt interpretationem." There is another reason: "Clausulæ inconsuetæ semper inducunt suspicionem"; "via trita via tuta."

Interpretation of Deeds.—The first and governing maxim here is "animus hominis est anima scripti," intention is the soul of an instrument. To arrive at it "contemporanea expositio est optima," the date and circumstances under which it was made; and with these may be coupled the familiar maxim, "qui hæret in litera, hæret in cortice," but the letter—words—must have their due weight, and the true task of the Court is to interpret the intention as expressed in the language; as James, L.J., called it, the intendment of the instrument. In construing words, "noscitur a sociis" is as good a guide legally as it is socially, and subject-matter is no less important than context, "verba accipienda sunt secundum

subjectam materiem." "Falsa demonstratio non nocet" is true if, but only if, "constat de personâ"; in other words, where the description is surplusage, "surplusagium non nocet."

Husband and Wife.—The maxims on this subject smack of an antiquity little consonant to the spirit of our age: "Uxor non est sui juris sed sub potestate viri"; "omnia uxoris durante conjugio mariti sunt"; "uxor et maritus unum in lege." They belong to the law's lumber-room—curious historical relics, like the scold's bridle and the cucking-stool. Maxims are yet to be coined which shall express the modern matrimonial relation. For the rest, the maxim-making mint seems now closed.

Maxims, though—as *bon mots*—they may have lost something of their original brightness, are still a useful currency. Indeed, this usefulness may be said to increase, rather than to diminish, as the law grows more complex and involved. They bring back the sophisticated mind—in wondering mazes lost—to first principles and a primitive simplicity, and for this reason they remain, and are likely long to remain, an enduring monument of the wisdom, justice, and good sense of the common law of England. And see MAXIMS OF EQUITY.

ALPHABETICAL LIST OF THE PRINCIPAL MAXIMS.

Actio personalis moritur cum personâ (*q.v.*) (p. 289).
Actor sequitur forum rei.
Actori incumbit onus probandi (p. 292).
Actus curiæ neminem gravabit.
Actus Dei nemini facit injuriam.
Actus legis nemini facit injuriam.
Actus non facit reum, nisi mens sit rea (p. 290).
Ad ea quæ frequentius accidunt jura adaptantur.
Ad quæstionem facti non respondent judices; ad quæstionem legis non respondent juratores.
Ædificatum solo, solo cedit.
Æquitas sequitur legem (p. 287).
Æquum et bonum est lex legum (p. 287).
Aer, lux, aqua profluens, feræ, nulli propria, omnibus communia (p. 291).
Alea et ganeo res turpissimæ.
Aliud est celare, aliud tacere (p. 289).
Allegans contraria non est audiendus.
Allegans suam turpitudinem non est audiendus.
Alterum non lædere (p. 288).
Ambiguis casibus semper præsumitur pro rege.
Ambiguitas verborum latens verificatione suppletur.
Angliæ jura in omni casu libertati dant favorem.
Animus hominis est anima scripti (p. 292).
Argumentum ab auctoritate est fortissimum in lege (p. 287).
Argumentum ab impossibili plurimum valet in lege.
Argumentum ab inconvenienti plurimum valet in lege (p. 287).
Assignatus utitur jure auctoris.
Aucupia verborum sunt judice indigna (p. 286).
Audi alteram partem (p. 286).
Bello parta cedunt reipublicæ.
Beneficium privatorum non potest publico juri derogare (p. 286).
Boni judicis est ampliare justitiam (p. 286).
Boni judicis est lites dirimere (p. 286).
Bonus judex secundum æquum et bonum judicat et æquitatem stricto juri præfert (p. 286).
Causa proxima et non remota spectatur.
Caveat emptor (p. 288).
Caveat venditor.
Caveat viator.
Certum est quod certum reddi potest.
Cessante causâ, cessat et effectus.
Cessante ratione legis, cessat ipsa lex.

Chirographum apud debitorem repertum præsumitur solutum.
Circuitus est evitandus.
Clausulæ inconsuetæ semper inducunt suspicionem (p. 292).
Cogitationis pœnam nemo patitur (p. 290).
Communis error facit jus.
Conditiones quælibet odiosæ; maxime autem contra matrimonium et commercium.
Consensus, non concubitus facit matrimonium.
Consensus tollit errorem.
Consentire matrimonio non possunt infra annos nubiles.
Consuetudo est altera lex (p. 287).
Consuetudo loci est observanda (p. 287).
Consuetudo regni Angliæ est lex Angliæ.
Contemporanea expositio est optima (p. 292).
Contractus infantis invalidus si in damnum sui spectet (p. 292).
Conventio privatorum non potest publico juri derogare (p. 287).
Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.
Cuilibet in suâ arte perito est credendum (p. 292).
Cujus est dare, ejus est disponere.
Cujus est solum, ejus est usque ad cœlum (p. 291).
Culpa lata dolo æquiparatur (p. 289).
Cursus curiæ est lex curiæ.
Damnum sine injuria esse potest. (See INJURY.)
Debile fundamentum fallit opus.
Debita sequuntur personam debitoris.
Debitor non præsumitur donare (p. 288).
Debitum et contractus sunt nullius loci.
Delegatus non potest delegare.
De minimis non curat lex (p. 287).
Derivata potestas non potest esse major primitivâ.
Dies dominicus non est juridicus.
Discretio est discernere per legem quid sit justum (p. 286).
Dolosus versatur in generalibus.
Domus sua cuique est tutissimum refugium (p. 291).
Dona clandestina sunt semper suspiciosa (p. 288).
Ex antecedentibus et consequentibus fit optima interpretatio.
Exceptio probat regulam.
Ex diuturnitate temporis omnia presumuntur rite et solenniter acta.
Ex dolo malo non oritur actio.
Ex maleficio non oritur contractus.
Ex nudo pacto non oritur actio (p. 288).
Expressio eorum quæ tacite insunt nihil operatur.
Expressio unius est exclusio alterius.
Expressum facit cessare tacitum.
Extra territorium jus dicenti impune non paretur.
Ex turpi causâ non oritur actio.
Falsa demonstratio non nocet (p. 293).
Fiat justitia, ruat cœlum.
Fieri non debet factum valet.
Fractionem diei non recipit lex.
Fraus est celare fraudem.
Fraus est legibus invisissima (p. 289).
Fraus est odiosa et non præsumenda (p. 289).
Fraus et dolus nemini patrocinari debent.
Furiosi nulla voluntas est.
Furiosus solo furore punitur.
Generalia specialibus non derogant.
Generalibus specialia derogant.
Habemus optimum testem confitentem reum (p. 291).
Id certum est quod certum reddi potest.
Ignorantia juris non excusat (p. 290).
Imperitia culpæ adnumeratur.
Impotentia excusat legem.
In æquali jure melior est conditio possidentis.
In Anglia non est interregnum.
In casu extremæ necessitatis omnia sunt communia.

In contractibus tacite insunt quæ sunt moris et consuetudinis.
In criminalibus voluntas pro facto non reputabitur (p. 290).
Index animi sermo (p. 291).
In favorem vitæ libertatis et innocentiæ omnia præsumuntur.
In fictione juris semper æquitas consistit.
In jure non remota causa sed proxima spectatur (p. 288).
Injuria non excusat injuriam.
Injuria non præsumitur.
In maleficiis voluntas spectatur non exitus.
In pari delicto potior est conditio possidentis.
Interest reipublicæ ne maleficia remaneant impunita (p. 290).
Interest reipublicæ ut sint fines litium (p. 286).
Judex damnatur cum nocens absolvitur (p. 286).
Judicis est judicare secundum allegata et probata (p. 286).
Judicis est jus dicere, non dare (p. 286).
Jura sanguinis nullo jure civili dirimi possunt.
Jus accrescendi inter mercatores locum non habet pro beneficio commercii.
Jus respicit æquitatem.
Justitia prior liberalitati (p. 288).
Leges posteriores priores contrarias abrogant.
Lex Angliæ sine parliamento mutari non potest.
Lex citius tolerare vult privatum damnum quam publicum malum (p. 286).
Lex delatores semper abhorret.
Lex injusta non est lex (p. 286).
Lex neminem cogit ad vana seu inutilia.
Lex nil frustra facit (p. 287).
Lex non cogit ad impossibilia (p. 287).
Lex non favet votis delicatorum (p. 292).
Lex spectat naturæ ordinem (p. 290).
Locus regit actum.
Mala grammatica non vitiat chartam.
Malitia supplet ætatem (p. 292).
Malum quo communius, eo pejus.
Malus usus est abolendus.
Matrimonia debent esse libera.
Meliorem conditionem suam facere potest minor, deteriorem nequaquam (p. 292).
Melior est conditio defendentis.
Melior est conditio possidentis.
Minime mutanda sunt quæ certam habuerunt interpretationem.
Misera est servitus ubi jus est vagum aut incertum (p. 287).
Mobilia sequuntur personam.
Modus et conventio vincunt legem (p. 287).
Multa non vetat lex quæ tacite damnat (p. 287).
Necessitas publica major est quam privata (p. 289).
Necessitas quod cogit defendit (p. 289).
Nefarium est per formulas legis laqueos innectere innocentibus.
Nemo agit in seipsum.
Nemo bis punitur pro eodem delicto (p. 290).
Nemo dat qui non habet (p. 288).
Nemo dat quod non habet (p. 288).
Nemo debet bis vexari, si constat curiæ quod sit pro unâ et eadem causâ.
Nemo debet esse judex in propria causâ.
Nemo debet locupletari ex alterius incommodo.
Nemo de domo suâ detrahi potest (p. 291).
Nemo est hæres viventis.
Nemo ex suo delicto meliorem suam conditionem facere potest.
Nemo patriam exuere potest.
Nemo præsumitur alienam posteritatem suæ prætulisse (p. 292).
Nemo punitur pro alieno delicto.
Nemo tenetur ad impossibilia.
Nemo tenetur adversarium suum contra se armare (p. 292).
Nemo tenetur divinare.
Nihil consensui tam contrarium est quam vis et metus (p. 288).
Nihil perfectum est dum aliquid restat agendum.
Nihil quod est inconveniens est licitum.
Nimia subtilitas in jure reprobatur (p. 290).

Nomina si nescis, perit cognitio rerum.
Non dat qui non habet.
Non jus sed seisina facet stipitem.
Non videntur qui errant consentire.
Noscitur a sociis (p. 292).
Nova constitutio futuris formam imponere debet.
Nullius charta legibus potest derogare (p. 287).
Nullum tempus occurrit regi.
Nullus videtur dolo facere qui suo jure utitur.
Nuptias non concubitus sed consensus facit.
Odio et amore caveat judex (p. 286).
Omne crimen ebrietas et incendit et detegit (p. 290).
Omne majus continet in se minus.
Omne quod solo inædificatur solo cedit.
Omnia præsumuntur contra spoliatorem.
Omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium (p. 292).
Omnia uxoris durante conjugio mariti sunt (p. 293).
Omnis contractus turpitudinis legibus invisus (p. 288).
Omnis indemnatus pro innoxio legibus habetur (p. 290).
Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.
Optimus interpres rerum consuetudo (p. 287).
Optimus interpres rerum usus (p. 287).
Particeps criminis non est audiendus.
Pater est quem nuptiæ demonstrant (p. 292).
Pejus est judicio quam per vim injuste facere (p. 286).
Pendente lite nihil innovetur.
Pereat unus ne pereant omnes (p. 290).
Plus valet oculatus testis unus quam auriti decem (p. 292).
Pœna ad paucos metus ad omnes perveniat (p. 290).
Potior est conditio defendentis.
Potior est conditio possidentis.
Principio obsistendum est (p. 290).
Privatorum conventio juri publico non derogat.
Privilegium contra rempublicam non valet.
Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.
Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest.
Quicquid plantatur solo solo cedit (p. 291).
Qui facit per alium facit per se (p. 288).
Qui hæret in literâ hæret in cortice (p. 292).
Qui inertibus dat, industrios nudat.
Qui jure suo utitur neminem lædit.
Quilibet potest renunciare juri pro se introducto.
Qui non negat fatetur.
Qui parcit nocentibus innocentibus minatur (p. 290).
Qui prior est tempore, potior est jure.
Qui sentit commodum sentire debet et onus.
Qui vult decipi decipiatur.
Quod dubitas ne feceris.
Quod fieri non debet factum valet.
Quod initio vitiosum est non potest tractu temporis convalescere.
Quod rex contra leges jubet pro injussu reputabitur (p. 285).
Ratihabitio mandato comparatur.
Ratio est anima legis (p. 287).
Res accessoria sequitur rem principalem.
Res inter alios acta alteri nocere non debet.
Res magis valeat quam pereat.
Respondeat superior (p. 288).
Rex anima legis (p. 285).
Rex nihil est quam lex agens (p. 285).
Rex non debet esse sub homine sed sub Deo et lege.
Rex non est ubi voluntas dominatur (p. 285).
Rex non potest peccare (p. 285).
Rex nunquam moritur.
Rex omnes leges regni presumitur tenere in scrinio pectoris sui (p. 286).
Salus populi suprema lex (p. 286).
Scribere est agere.

Seisina facit stipitem.
Semper præsumitur pro negante.
Semper pro legitimatione præsumitur.
Sic utere tuo ut alienum non lædas (pp. 288, 291).
Sicut Natura non facit saltum, ita nec lex (p. 287).
Simplex commendatio non obligat.
Stabit presumptio donec probetur in contrarium (p. 292).
Sua cuique domus arx esto (p. 291).
Sub clypeo legis nemo decipitur (p. 289).
Summa ratio est quæ pro religione facit (p. 287).
Summum jus, summa injuria.
Traditio loqui facit chartam.
Transit in rem judicatam.
Transit terra cum onere.
Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest.
Ubi jus ibi idem remedium.
Uxor et maritus unum in lege (p. 293).
Uxor non est sui juris sed sub potestate viri (p. 293).
Vani timoris justa excusatio non est (p. 289).
Venia privatim læsi non sufficit legibus (p. 290).
Verba accipienda sunt secundum subjectam materiem (p. 292).
Verba chartarum fortius accipiuntur contra proferentem.
Veritas est justitiæ mater (p. 287).
Via trita, via tuta (p. 292).
Vigilantibus et non dormientibus jura subveniunt.
Vita reipublicæ pax et anima libertas et corpus leges (p. 287).
Volenti non fit injuria (p. 289).
Voluntas testatoris est ambulatoria usque ad extremum vitæ exitum.
Vox emissa volat—litera scripta manet.

Maxims of Equity.—The maxims of equity (to which a cursory reference has already been made in the article EQUITY) may well be said to be the seeds from which the great system of Equity Jurisprudence has grown. From these dicta of eminent Chancellors have been modelled the clearly defined principles on which equity will give or refuse relief, and many of the great doctrines of equity are but the maxims applied or extended to particular classes of cases. Accordingly a clear understanding of these maxims is of great importance; the exigencies of space do not allow us to do more than notice some of the more important, and illustrate them by reference to some leading cases and leading principles and doctrines of equity.

I. *Equity Acts in personam.*—This principle was recognised and acted upon by Lord Hardwicke in *Penn* v. *Lord Baltimore*, 1750, 1 Ves. 444; 1 White and Tudor, *L.C.*, 7th ed., 755: "The strict primary decree in this Court as a Court of equity is *in personam*," and accordingly specific performance was decreed of articles executed in England for settling the boundaries of two provinces (Pennsylvania and Maryland) in America. In an old case (*Earl of Athol* v. *Earl of Derby*, 1 Ch. Cas. 220) the Court of Chancery had enforced a contract respecting land situate out of the jurisdiction, viz. in the Isle of Man. A more recent illustration will be found in *Ewing* v. *Orr-Ewing*, 1883, 9 App. Cas. 34, where the principle is stated by Lord Selborne: "The Courts of equity in England are and always have been Courts of conscience operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the colonies, in foreign countries" (p. 40). And it was held that jurisdiction against trustees which is not excluded *ratione legis rei sitæ* as to land cannot be excluded as to moveables, because the author

of the trust may have had a foreign domicile. As to the rights of common law Courts, see *British South Africa Co.* v. *Companhia de Moçambique*, [1893] App. Cas. 602, where it was held that the Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for trespass to land situate abroad; and that the rules of procedure under the Judicature Acts with regard to local venue (Order 36, r. 1) did not confer any new jurisdiction. For all actions affecting real property and crimes are strictly local; and though the Court of Chancery extended the jurisdiction of the English Courts, the extension was in the cases of trusts, fraud, and contract, and no further.

II. *Who seeks Equity must do Equity, i.e.* he who claims relief on equitable grounds must be ready to act equitably and fairly. The most familiar illustrations of the maxim are the doctrines of (1) a wife's equity to a settlement; (2) consolidation; (3) the conditions as to setting aside bargains with expectant heirs.

(1) The first of these doctrines in consequence of the provisions of the Married Women's Property Acts is now limited in its application to cases of women married before 1883 entitled to reversionary interests in personalty under wills or deeds taking effect before that date. In *Reid* v. *Reid*, 1886, 33 Ch. D. 220, the doctrine prevailed, and the fund in question was by the Court settled on the wife. The general rule is that half the property will be settled, but gross misconduct on the husband's part may lead the Court to settle a greater share and even the whole (see *Reid* v. *Reid*, *supra*, and cases there cited). The wife's equity to a settlement in the case of a legacy precedes the executor's right of retainer for the husband's debt (*In re Briant, Poulter* v. *Shackel*, 1888, 39 Ch. D. 471), and is good as against the husband's trustee in bankruptcy, and also volunteers taking from the husband (*Roberts* v. *Cooper*, [1891] 2 Ch. 335; *Howard* v. *Howard*, 1895, W. N. 4; and see HUSBAND AND WIFE).

(2) As to consolidation: the mortgagor's right to redeem is the creation of equity only. Accordingly, the holder of two mortgages by the same person may, when the mortgagor wants to redeem one of them, ask him to deal equitably and redeem both. That in its simplest form is clearly not an extension of the principle, "he who seeks equity must do equity," but of course the extension of the doctrine of consolidation by *Vint* v. *Padget*, 1858, 2 De G. & J. 611, to the case of mortgages originally held by two different persons, and subsequently becoming vested in one, goes beyond mere equitable dealing. The doctrine is treated under CONSOLIDATION OF MORTGAGES. Suffice it to say here that the Courts lean against its extension (*Jennings* v. *Jordan*, 1881, 6 App. Cas. 698), but the doctrine as laid down in *Vint* v. *Padget*, and cases to the same effect, though disapproved, has been considered by them too long established to be overthrown. See *Pledge* v. *White*, [1896] App. Cas. 187 (and cases there cited).

(3) The Court will relieve "expectant heirs" in the case of improvident bargains, as, *e.g.*, where money has been borrowed on promissory notes; but the Court will not order securities, etc., to be delivered up unless the plaintiff pays the sum actually borrowed and interest thereon at 5 per cent. (*Aylesford* v. *Morris*, 1873, L. R. 8 Ch. 484; *Fry* v. *Lane*, 1888, 40 Ch. D. 312; and see CATCHING BARGAINS).

III. *Equity Imputes an Intention to Fulfil an Obligation.*—The doctrines of performance and satisfaction are the best illustrations. By the doctrine of performance equity presumes an act done to have been the very act in respect of which the obligation existed; by satisfaction, the presumption is that the act done is in substitution (or satisfaction) of the act in respect of

which the obligation existed. On performance, *Lechmere* v. *Lechmere* (1735, 2 White and Tudor, 7th ed., 362) is the leading case (a covenant by A. on his marriage to lay out within a year £30,000 in land, with consent of trustees of settlement is presumed performed by his buying land up to £30,000, but after the year, and without consent of the trustees, with the result that his heir-at-law could not claim to have £30,000 laid out in land besides taking the land already bought, and which descended to him as heir-at-law). Of satisfaction, the most frequent instances are satisfaction of a legacy by a portion to a child (*Ex parte Pye*, 1811, 18 Ves. 140; 2 White and Tudor, 364; 11 R. R. 173) of a debt by a legacy to a creditor (*Talbot* v. *Duke of Shrewsbury*, 1714, 2 White and Tudor, 378), wherein the one gift is presumed by equity to be made with the intention of fulfilling the obligation to make the other; and to this latter, accordingly, the donee or creditor has no claim. And see the rule against double portions discussed in *In re Ashton, Ingram* v. *Papilcon*, [1897] 2 Ch. 574; reversed on the facts in [1898] 1 Ch. 142. See SATISFACTION.

IV. *Equity looks upon that as done which ought to be done.*—"Conversion" and "reconversion" are the most important doctrines flowing from the maxim. In looking upon that as done which ought to be done, equity by its rules produces the same results as if it were done. Accordingly, where A. contracts to sell land to B., the land is in equity A's. and passes to his heir; where money is directed to be employed in the purchase of land, or land directed to be sold and converted into money, the property in either case is impressed by equity so as to become and devolve as the class of property into which it is directed to be converted. Likewise, where partners buy land for partnership purposes in default of express agreement, the property *ipso facto* becomes personalty (see the leading cases of *Fletcher* v. *Ashburner*, 1779, 1 Bro. C. C. 497; 1 White and Tudor, 968; and see CONVERSION OF PROPERTY; RECONVERSION).

Likewise, when possession has been given under an agreement for a lease, the tenant holds under the same terms in equity as if a lease had been granted; he is in equity a lessee (and since the Judicature Acts, he has the same rights and liabilities as a lessee in every branch of the Court) (*Walsh* v. *Lonsdale*, 1882, 21 Ch. D. 9).

V. *Equity regards the Spirit and not the Letter.*—The whole of the system of relief given by equity acting as "a Court of conscience," and regarding the substance of the transaction, is illustrative of this maxim. A mortgage is in form an out-and-out conveyance, with a proviso for redemption on a given date; yet the doctrine of equity is "once a mortgage always a mortgage," and the mortgagee has always his equity of redemption. Nor will equity allow any transaction, collateral to the mortgage, to clog the equity of redemption. And many transactions which in form are sales are treated by equity as mortgages. So equity on the same principle has given relief against forfeiture; and where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will relieve against the recovery of such penalty. The leading cases on the relief against forfeiture and penalties respectively are: *Peachy* v. *Duke of Somerset*, 1824, 2 White and Tudor, 250; *Sloman* v. *Walter*, *ibid.* 257. For a recent illustration of "once a mortgage always a mortgage," see *In re Bell*, [1896] 1 Ch. 1; and for cases where sales followed by a hiring agreement of the premises sold have been held to be in fact a loan, see *Madell* v. *Thomas*, [1891] 1 Q. B. 230; *Yorkshire Railway Waggon Co.* v. *M'Lure*, 1881, 19 Ch. D. 478; and cases there cited (see BILLS OF SALE). In the same way equity will not allow the Statute of Frauds to be pleaded to conceal a fraud.

VI. *Equality is Equity.*—Equity favours true equality both of rights and liabilities dividing burdens and benefits in equal shares. Hence its leaning to tenancy in common, instead of joint-tenancy, when the purchase-money has been advanced in unequal shares; in mortgages; and the application of the doctrine *jus accrescendi inter mercatores non habet*, when land is bought for business purposes by two or more, see JOINT-TENANCY and the leading cases of *Lake* v. *Gibson*; *Lake* v. *Cruddock*, 1732, 2 White and Tudor, 952. On the same principle it divides burden and benefit equally between co-sureties (*Dering* v. *Earl of Winchelsea*, 1787, 1 Cox, 318; 1 R. R. 41), the right of contribution between co-sureties being founded on equity, not on contract; it being equitable that the burden should be borne by all alike. "The risk and the relief ought to be coextensive," quoted in *Steel* v. *Dixon*, 1881, 17 Ch. D. 831. See GUARANTEE; PRINCIPAL AND SURETY.

VII. *Vigilantibus non dormientibus æquitas subvenit.*—Laches, delay, and acquiescence have always been held a bar to equitable relief. But it is important to remember that legal rights are not barred by any time other than that prescribed by the Statute of Limitations, and that the maxim in no way infringes on the province of the statute; it applies only in cases of equitable relief. Where a specialty creditor brought an action to set aside a conveyance under 13 Eliz. c. 5, ten years after the grantor's death, and the plaintiff had been aware of the facts during the whole of that period and gave no satisfactory reason for his delay, it was none the less held that as the plaintiff was coming to enforce a legal right the Court could not refuse to allow relief on the mere ground of delay, unless there had been such delay as to create a statutory bar—such a case standing on quite a different footing from a suit to set aside on equitable grounds a deed valid at law (*In re Maddever*, 1883, 27 Ch. D. 523). On the other hand, acquiescence on plaintiff's part, which would not be sufficient to bar his action, may be and generally is sufficient to induce the Court to withhold such equitable remedies as specific performance or an injunction, and give damages instead (*Sayers* v. *Collyer*, 1884, 28 Ch. D. 103). See SPECIFIC PERFORMANCE; INJUNCTION.

VIII. *Equity follows the Law.*—This maxim means little more than that, failing particular reasons for deviating from the rules by which the common law is guided, equity adopts and applies such rules. Accordingly, to equitable estates equity applies the rules of common law as to interest, possession, incidents, and the like. The rules of construction, such as the rule in *Shelley's* case and *Wild's* case respectively, likewise apply. The maxim would, of course, if taken too literally, mean that law and equity are one and the same thing, and must be taken concurrently with the other maxims already noticed.

Generally.—There are, besides these already noticed, many other maxims often quoted, concerning which, even if space permitted, it would not be profitable to say more than to refer the reader to other parts of the work. Such are: "Where equities are equal the law prevails" (illustrated by the doctrine of *tacking* and the privileges conferred by the legal estate; as to which, see LEGAL ESTATE; TACKING); "*Qui prior tempore potior jure*," illustrated by the doctrine that *notice* prevents *tacking*; as to which, see the last-mentioned titles, and NOTICE; PRIORITIES.

May.—The words "may," "it shall be lawful," "it shall and may be lawful," and the like, "are potential, and never (in themselves) significant of any obligation. The question whether a judge or a public officer, to whom a power is given by such words, is bound to use it upon any par-

ticular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power" (per Lord Selborne in *Julius* v. *Bishop of Oxford*, 1880, 5 App. Cas. 235). According to their natural meaning they are permissive or enabling words merely, and it lies upon those who contend that they are to be read as obligatory to establish this (per Earl Cairns, L.C., *ibid.* 223). In a number of cases, most of which are dealt with in the judgments in *Julius* v. *Bishop of Oxford*, *supra*, the words have been construed as obligatory; the principle laid down in those cases being "that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised" (*ibid.* 225). (See the cases on this subject collected and classified in Stroud, *Jud. Dict.*)

Mayhem is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting to defend himself or annoy his enemy, or by reason of which he is generally and permanently weakened (Hawk. P. C. bk. i. c. 44; Steph. *Dig. Cr. Law*, 5th ed., art. 227; *R.* v. *Boyce*, 1824, 1 Moo. C. C. 29; *R.* v. *Sullivan*, 1841, C. & M. 209). It is distinct from disfiguring or doing grievous bodily harm. See BODILY HARM, vol. ii. p. 204.

To maim a man is a felony at common law, even if he consents to it, except for medical or surgical reasons. It may be compared with the offences of men who cut or have cut off a finger to avoid military service (see 13 Co. *Inst.* 127; Army Act, 1881, c. 58, s. 18).

The punishment is now regulated by 7 & 8 Geo. IV. c. 28, s. 8.

It is a felony (*a*) to shoot any person with intent to maim; (*b*) unlawfully and maliciously by the explosion of an explosive substance to maim any person (1861, c. 100, s. 28); (*c*) unlawfully and maliciously to explode an explosive, or send or deliver a corrosive fluid or destructive or explosive substance with intent to maim (1861, c. 100, s. 29)—punishable by penal servitude for life or not less than three years, or imprisonment for not over two years with or without hard labour. The offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1; 1861, c. 100, ss. 18, 28, 29; 1891, c. 69, s. 1).

Maynooth College—A college established at Maynooth, in the county of Kildare, Ireland, in 1795, for the education of persons professing the Roman Catholic religion. By 8 & 9 Vict. c. 25, the trustees of the college were incorporated and empowered to take and hold lands, and the original endowment was largely increased, but by the Irish Church Act, 1869, the endowment was withdrawn, a capital sum being granted to discharge existing interests.

Mayor—The chief officer of a municipal borough. He is elected annually on 9th November by the council of the borough from among the aldermen and councillors, or persons qualified to be councillors (1882, c. 50,

ss. 11, 14, 15, 61). His term of office is one year, but he continues in office until his successor has accepted office and signed the necessary declaration of acceptance.

If the mayor-elect declines to take office, he incurs a fine (1882, c. 50, s. 34). He is *ex officio* during his year of office and the next year a justice of the peace for the borough by statute; but this does not entitle him to do any act at the borough Quarter Sessions, except to adjourn the Court in the absence of the recorder (1882, c. 50, ss. 155, 161). He is entitled to precedence in the borough, except over a stipendiary magistrate sitting for purposes of justice, or county justices sitting for cases not arising in the borough. He may receive a salary, but it must not be voted for the purpose of indirectly defraying *ultra vires* expenses (*A.-G.* v. *Cardiff* (*Mayor*), [1894] 2 Ch. 337). When there is a salary, the mayor cannot vote for himself; but where there is not, he can, if presiding over the election, vote twice, *i.e.* on the poll and by casting vote (*Nell* v. *Longbottom*, [1894] 1 Q. B. 767).

Mayor's Court.—See LONDON CITY.

Means.—By sec. 5, subsec. 2, of the Debtors Act, 1869, where it is shown to the satisfaction of the Court that a judgment debtor has, or has had, since the date of the order or judgment made against him, the means to pay the judgment debt, and has refused or neglected to pay the same, the Court may make a committal order against such judgment debtor. In determining whether a judgment debtor has had "the means to pay" the judgment debt, the Court will take into consideration the fact that he has received a gift of money, and will not merely consider his earnings or his fixed income (per Cotton and Lindley, L.JJ., in *Ex parte Koster*, 1885, 14 Q. B. D. 597). The Court has a power of committal under the section if it is shown that the debtor has had the means of paying part of the debt even though he may not have had the means of paying the whole amount (*In re Fryer*, 1886, 3 Morrell, 231). See DEBTORS ACT.

Measure.—See WEIGHTS AND MEASURES.

Measurement of Distance.—See DISTANCE, MEASUREMENT OF.

Meat.—See BUTCHER; FOOD. The sale of the flesh of horses, asses, or mules for the food of man is regulated by 52 & 53 Vict. c. 11.

Meat, Unsound.—See FOOD, vol. v. p. 400.

Mechanics' Institution.—A bequest to the trustees for the time being of a mechanics' institution, to be applied to the building fund in connection with the same, was held void as tending to a perpetuity, in *In re Dutton*, 1878, 4 Ex. D. 54; so also in *In re Sheraton's Trusts*, 1884, W. N. p. 174. See CHARITIES.

Medals.—Making or having in possession for sale, or offering for sale, or selling any medal, cast or coin of a metallic material resembling in size, figure, and colour, current gold or silver coin, or having a device resembling any device of the gold or silver coinage, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the current gold or silver coin, is a misdemeanour, punishable with imprisonment for not more than one year, with or without hard labour (Counterfeit Medal Act, 1883, 46 & 47 Vict. c. 45).

By the Army Act, 1881 (44 & 45 Vict. c. 58), medals are included amongst military decorations (*q.v.*).

Mediate; Mediatisation—From a term applied under the old German Empire to possessions not held *immediately* from the Imperial Crown, but only *mediately* through other States. During the wars of the French Revolution mediatisations on a large scale were effected by way of compensation to German sovereigns who had been obliged to relinquish part of their lands to France. The process was continued afterwards, thus gradually diminishing the number of petty sovereign States which the break up of the Holy Roman Empire had left in a state of independence. The Act of Constitution of the Germanic Confederation (June 8, 1815), fixing the status of mediatised princes, stipulated *inter alia* that they should retain their right to treatment as equal in birth to all other princely houses.

Mediation is the interposing by a neutral and friendly State between two States at war or on the eve of war with each other, of its good offices to restore or to preserve peace. The term is sometimes used as a synonym for Intervention (*q.v.*), but mediation differs from it in being purely a friendly act. The phrase "armed mediation" is therefore a misnomer.

In the Middle Ages and down to our time the Pope has been a frequent mediator. A recent instance is the mediation of Leo XIII. in the dispute between Germany and Spain relative to the hoisting of the German flag on one of the Caroline Islands (August 25, 1885). Germany consented to arbitration, but owing to discontent at Madrid, Germany (September 25) proposed to substitute the mediation of the Pope. Spain accepted (October 22), and Leo XIII. drew up proposals which were accepted by the two States in question, and became the basis of the protocol which was eventually signed at Rome (December 17, 1885).

Until some years ago a growing disposition was shown by certain States of Central and South America, in cases of international dispute, to look to the Government of the United States as their friend and mediator; and it is probable that war in several cases was prevented by North American mediation.

Agreements have been made from time to time by treaty for mediation as a preliminary measure for averting war. Thus under the Treaty of Paris (March 30, 1856) it was provided that—

> If any dissension should arise between the Sublime Porte and one or more of the other signatory Powers which threaten the maintenance of their good relations, the Sublime Porte and each of these Powers before resorting to force shall give an opportunity to the other contracting parties to mediate between the parties in order to prevent such extreme measures (Art. 8).

In the Convention of Berlin of 1885 it was similarly provided that—

> In the case of a serious dissension having arisen on the subject of or within the territories mentioned in Article 2, and placed under the *régime* of commercial liberty, between the signatory Powers to the present act or any Powers that may afterwards adhere thereto, the Powers engage themselves before taking up arms to have recourse to the mediation of one or more of the friendly Powers (Art. 12).

A case in which a contracting State agreed to resort to the good offices of the co-contracting State in differences with other States is the Treaty of Yeddo between the United States and Japan (July 29, 1858), in which it was provided that—

> The President of the United States, at the request of the Japanese Government, will act as a friendly mediator in such matters of difference as may arise between the Government of Japan and any European Power (Art. 2).

In some cases mediation has been accepted by a protocol, which has given it the character of a preliminary ARBITRATION (*q.v.*), as in the case of the mediation of Spain between Italy and the Republic of Columbia in 1886. This proctocol, dated May 24, 1886, contained the following article:—

> If it results from the said mediation that Columbia has to pay an indemnity, the amount of this indemnity, as well as the forms, terms, and guarantees of payment without appeal or reserve whatsoever, shall be referred to the arbitration of a mixed commission, composed thus: the Italian representative at Bogota, a delegate of the Columbian Government, and the Spanish representative at Bogota. The work of the mixed commission shall be finished within six months after the notification by the Spanish Government of its conclusions to the representatives of the two parties at Madrid (Art. 3).

Mediation must be distinguished from *good offices*. The demand of good offices or their acceptance does not confer any right of mediation. The offer of Russia to mediate between the United States and Great Britain in the war of 1812 was at once accepted by the former; and in order to avoid delays incident to the distance of the parties, plenipotentiaries were commissioned to conclude a treaty of peace with persons clothed with like power on the part of Great Britain (Wait's State Papers, vol. ix. p. 223; President Maddison's Message, May 25, 1813). Sir James Mackintosh considered the rejection of the proffered mediation whereby hostilities were unnecessarily prolonged, the less justifiable as "a mediator is a common friend who counsels both parties with a weight proportioned to their belief in his integrity and their respect for his power. But he is not an arbitrator to whose decisions they submit their differences, and whose award is binding upon them" (Hansard, vol. xxx. p. 526, April 11, 1815).

In the war between Peru, Bolivia, and Chili, the United States brought to the notice of the Governments concerned that their friendly offices "for the restoration of peace upon an honourable basis would be extended in case the belligerents shall exhibit a readiness to accept them" (President Hayes' Third Annual Message, 1879). A South American case concerning this country, in which the United States offered their mediation, was the Venezuela-Guiana boundary question, which was tendered to the British Government in the following form:—

> I am instructed to tender to Her Majesty's Government the good offices of the United States to promote an amicable settlement of the respective claims of Great Britain and Venezuela in the premises, and the arbitration of the United States Government in respect to the questions involved which are understood only to refer to historical facts, should such arbitration prove acceptable to both parties.

(Mr. Phelps to Lord Salisbury, February 8, 1887.)

The proposed mediation was declined by Great Britain. The good offices nevertheless resulted in a treaty between Great Britain and Venezuela to submit the question to arbitration (Washington, February 2, 1897). See VENEZUELA-GUIANA BOUNDARY DISPUTE; ARBITRATION, INTERNATIONAL; INTERVENTION.

Mediators of Questions—These were six persons authorised by a statute of Edward III.'s reign to settle disputed questions between wool merchants.

Medical Jurisprudence.

TABLE OF CONTENTS.

INTRODUCTORY.

Scope of Subject 306
Medical Witnesses—Common and Expert 306
Confidential Communications . 306
Dying Declarations 306
Coroners' Inquests 307

QUESTIONS CONNECTED WITH THE DEAD BODY.

Death, Somatic and Molecular, Signs of 307
Cessation of Circulation . . . 308
„ Respiration . . . 308
Post-mortem Cooling 308
Muscle Changes—Flaccidity—Rigidity—Effect on Heart 308
Other Changes after Death . . 310
Estimate of Period since Death . 311
Post-mortem Stains 311
Putrefaction 312
Mummification and Saponification . 313
Examination of Dead Body—General Rules 314

MODES OF DYING.

Natural Causes of Sudden Deaths 314
Death by Syncope 315
Death by Asphyxia 315
Death by Coma 315

VIOLENT AND UNNATURAL DEATHS.

Mechanical Injuries and Wounds . 316
Bruises 316
Incised Wounds 317
Punctured Wounds 317
Lacerated Wounds 317
Injuries before and after Death . 317
Injuries to Special Regions—the Head 318
Injuries to the Spine—the Neck—the Thorax—the Abdomen—Internal Organs 319
Fractures 320
Gunshot Wounds 320
Accidental, Suicidal, and Homicidal Wounds 320
Causes of Death from Wounds—Direct; Indirect 321
Responsibility when Indirect . . 321
Death following Operation for Cure of Wound 322
Malapraxis 322
Burns and Scalds—Modes of Death by Fire 322
Lightning—Cold 323
Starvation 323
Hanging 324
Strangulation—Throttling . . 324
Suffocation 325
Drowning 325
Poisoning (see art. TOXICOLOGY)

QUESTIONS CONNECTED WITH THE ORGANS OF GENERATION.

Pregnancy, Signs of 327
Recent and Non-recent Delivery, Signs of 328
Criminal Abortion—Drugs; Mechanical Means 329
Infanticide—Proofs of Live Birth . 330
Tests of Infant having breathed . 331
Other Proofs of Live Birth . . 332
Causes of Death—Natural and Accidental 333
Causes of Death—Homicidal . . 334
Live Birth in relation to Inheritance 335
Impotence and Sterility . . 335
Legitimacy—Period of Gestation . 336
Rape—Carnal Knowledge, Proofs of 337
Drugging and Chloroforming—Charges against Medical Men . 338
Seminal Stains 339
Unnatural Offences 339

COLOURED STAINS.

Blood-Stains—Microscopic, Spectroscopic, and Chemical Tests . . 339

INSANITY.

Conflict of Legal and Medical Views 340
Illusions, Hallucinations, and Delusions 341
Lucid Intervals 341
Types of Insanity—Mania 341
Melancholia . . . 342
Dementia 342
Delusional Insanity . . 342
Moral Insanity . . . 342
Impulsive Insanity . . 342

[*Note.*—Small capitals are used in this article, not as cross references, but to assist the eye in looking for mention of any particular subject not sufficiently important to have a separate paragraph with a formal heading devoted to it.]

MEDICAL JURISPRUDENCE—sometimes called Forensic or Legal Medicine—is described in Dr. Taylor's standard work on the subject as a branch of medicine, and he defines it as "the science which teaches the application of every branch of medical knowledge to the purposes of the law."

It is thus a very wide subject, demanding an unlimited knowledge of medicine in all its branches, and at least a general acquaintance with a considerable body of positive enactments and common law principles. These will be very briefly referred to in the following article, which aims chiefly at expounding, for the benefit of lawyers as well as medical practitioners, the METHODS of medical jurists, and the PRINCIPLES by which they must be guided in their investigations and in their inferences.

MEDICAL WITNESSES.—The larger treatises on medical jurisprudence (see end of this article) give many valuable hints to medical witnesses concerning their conduct in the witness-box, together with a short exposition of the most important rules of evidence and procedure in the various Courts. These *rules*, as well as the question of *fees*, may be studied in more detail in the various articles relating to them in the present publication, or in the purely legal treatises of Archbold, Stephen, etc., and need not be dealt with in detail here.

Medical witnesses should clearly understand the distinction between "common" and "expert" witnesses. They may be called upon to give evidence in either capacity, and in fact are generally questioned in both capacities. A witness testifying to *facts* within his knowledge is a common witness; when he gives an opinion as to the *interpretation* of facts (or assumed facts), based on his special knowledge of the subject, he is testifying as an expert witness. Thus as a common witness he may be required to testify to the actual signs and symptoms observed by him in his patient. If he is asked for his opinion as to the interpretation to be put upon these observed symptoms—the medical inferences to be drawn from them—he answers as an expert.

Speaking generally, all persons, including medical men, are bound to attend and give evidence in Court as common witnesses, if properly summoned to do so. It is doubtful whether anyone can be punished for refusing to attend and give evidence merely as an expert. But the law of contempt is very elastic, and the neglect of a subpœna is always risky. Coroners have special statutory powers.

The universal rule of honour amongst medical men in all civilised countries precludes them from divulging to anyone CONFIDENTIAL COMMUNICATIONS made to them in their professional capacity. The statute law of many foreign countries enforces this obligation by penalties, and regards it as sacred even in the witness-box. English law, however, takes a different view, and, if the judge sees fit, compels a medical witness to reveal in open Court the most confidential communications, and to disregard the most solemn promises. See CONFESSION, vol. iii. p. 264.

DYING DECLARATIONS.—There is no obligation on a medical attendant

to record the declarations of a dying man. But as he is often the only person present who is capable of undertaking the duty, he ought, in the interests of justice, to do so in an emergency.

A *dying declaration* is a statement made by a person, who believes himself to be dying (and does afterwards die), as to the cause of his death, or the circumstances which resulted in his death. It is admissible in evidence against a person charged with his murder or manslaughter, provided the judge is satisfied that, at the time of making it, the declarant was in actual danger of his life, and had unreservedly given up all hope of recovery.

The declaration should therefore commence with a statement to this effect, and should go on as nearly as possible in the exact words of the declarant, and should be read over to him, and signed, if possible, by him and by the medical man and any witnesses present. If there is no time to write it down before the man's death, it should be written down immediately after, and signed by any witnesses present.

THE CORONER'S COURT.—This is the most primitive and informal of all the criminal Courts, and is occupied almost exclusively with medico-legal questions. For the procedure in this Court, and for the legal obligations and duties of medical men in regard to INQUESTS, see art. CORONER, vol. iii.

In ordinary cases, where a person has died a natural death, the medical attendant is bound, under a penalty of 40s., to *certify* to the best of his belief as to the cause of death.

Where, however, he has reasonable ground to suspect that his patient's death was caused directly or indirectly by violence, or was other than "natural," or where he cannot with reasonable certainty (founded on his own observation and knowledge of the patient during life, and not merely on the statements of others) assign the nature of the disease, his duty is to decline to give a certificate, and refer the matter to the coroner, who is the officer specially appointed to make inquiry into *all* the circumstances.

This duty is apt to be overlooked where the violence or injury occurred some time before, and death was immediately due to some intercurrent disease; or, conversely, where the patient was dying of natural disease, in the course of which an accident or injury occurred which may have accelerated death.

If an inquest is held, all questions connected with the dead body are first to be considered.

QUESTIONS CONNECTED WITH THE DEAD BODY.

It is usual to draw a distinction between "SOMATIC" death—that of the body as a whole—and "MOLECULAR" death, or death of the tissues, which are the components of the body. These retain for a short time after somatic death certain so-called "vital" qualities which they possessed during the life of the body as a whole, *e.g.* the power of contracting in response to electric and other stimuli (see *infra*, p. 309). In ordinary language death means somatic death. The occurrence of PUTREFACTION is the most obvious and convincing of the SIGNS OF DEATH. But, even before that, a body can be ascertained to be certainly dead from one or more of the following:—

1. *Cessation of the heart's action.*
2. *Cessation of respiration.*
3. *Coldness of the body.*
4. *Cadaveric rigidity, or rigor mortis.*
5. *Changes in the eyes and skin.*

The last three of these indications serve also to fix within certain limits the probable period that has elapsed since death.

CESSATION OF THE HEART'S ACTION.—Physiologically considered, the cessation of the circulation is probably the immediate cause of death—the necessary and sufficient antecedent of death—in every case. When the heart has finally stopped, all other vital processes stop at the same instant, and the living tissues become inanimate matter. Respiration may be suspended for some minutes without necessarily causing death or permanent injury, provided the heart holds out. Even the heart-beat may sometimes be temporarily suspended for a second or two, or at least apparently so, without death resulting. But it will be quite safe to assume that death has occurred if, on careful listening with the ear or stethoscope placed over the apex of the heart, no sound or movement has been heard for five minutes.

The CESSATION for the same period (five minutes) of all visible and audible signs of RESPIRATION will in most cases be sufficient proof of death (see ASPHYXIA, *infra*, p. 315). The visible signs are the movements of the chest and abdomen, which are best observed together. The audible signs are best heard with the stethoscope over the bronchi. In the case of an asphyxiated person the heart's action may go on for two or three minutes, or even longer, after consciousness has been abolished and breathing has ceased. During that period the body is not only not dead, but may be capable of RESUSCITATION. But in most forms of death the two functions (respiration and circulation) cease almost simultaneously, and in any case respiration never outlives heart-action.

POST-MORTEM COOLING.—After death the body cools gradually, and at a diminishing rate, until it reaches the temperature of the surrounding medium—air, water, etc. The time occupied in this process will obviously vary according as external circumstances are favourable or unfavourable to loss of heat by radiation and conduction. It is impossible, therefore, to say, without reference to these conditions, how long a body occupies in cooling, but we may perhaps take, as a rough standard, FIFTEEN TO TWENTY HOURS as the time for an average adult dying in bed in this country. Occasionally after death there is a remarkable rise of temperature, due to certain chemical reactions going on within the dead body.

To ascertain accurately the temperature of a dead body, the thermometer should always be placed in the rectum, where some degree of warmth may be noted hours after the skin has reached the level of the atmosphere.

Post-mortem CHANGES OF ATTITUDE are sometimes observed, and are due to slow contractions and subsequent relaxations of certain muscles.

POST-MORTEM CHANGES IN THE MUSCLES.—Immediately after death a remarkable SERIES OF CHANGES commences in the muscles. These present three well-marked stages, which, with exceptions to be mentioned later, occur always in a definite order, and within variable but limited periods of time, so that the existence of one or other of these stages helps to fix approximate limits to the period that has elapsed since death. These stages are—

A. *Stage of muscular flaccidity and irritability.*

B. *Stage of cadaveric rigidity, or rigor mortis.*

C. *Stage in which rigor mortis and irritability have both finally disappeared, and putrefaction has begun.*

A. THE FLACCID AND IRRITABLE STAGE begins at the moment of somatic death. The muscles become flabby and relaxed, hence the dropping of the

lower jaw and of anything held in the hand. They retain, however, for a time the capacity they had in life of contracting in response to certain stimuli — electric shocks, sharp blows, chemical irritants, etc. This "irritability" gradually passes off in from three to ten hours. In exceptional cases, where the vitality of the tissues is already much exhausted at the moment of death, the flaccid stage may be extremely short, or even apparently non-existent, the muscles passing at once into the next stage, rigor mortis.

B. CADAVERIC RIGIDITY.—At some variable time, differently estimated by different observers, but perhaps most frequently about the third or fourth hour after death, the muscles become gradually firm and stiff—RIGOR MORTIS sets in. They are affected one after another, usually in a definite order, beginning with the neck, lower jaw, and face, and passing down to the upper limbs, the trunk, and finally the lower limbs, until the whole body is rigid—the process occupying two or three hours. It lasts a variable time—a few hours to fifteen days—and then disappears gradually from the muscles in the same order that it came on. It is accompanied by a very slight contraction of the muscles, not enough to alter the position of the body, which therefore stiffens in the posture it happens to have when the process commences. The cause of rigor mortis is generally said to be the coagulation of a certain component of the muscular tissue (myosin). But this explanation is obviously incomplete, and recent experiments make it clear that the nervous system exercises a modifying influence, not yet thoroughly understood, on the phenomena of rigor mortis. It passes off about the time that putrefaction commences, but it is not proved that there is any causal connection between the two conditions. Its effect upon the countenance is to produce a "drawn" look, so altering the expression while it lasts that identification is sometimes doubtful.

The HEART is affected rather earlier than the rest of the body—usually about an hour after death, and remains rigid for twelve to thirty-six hours. The heart also contracts very considerably, so that the capacity of its cavities is lessened and the thickness of its walls increased. This fact throws *serious doubts* upon the inferences usually drawn with easy confidence from the appearance of the heart on examining it post mortem, since it must always be difficult if not impossible to determine the state of the heart at the time of death from an examination made after it has contracted, and partly expelled its contents, even if the contraction and rigidity have passed off again.

In Strassmann's EXPERIMENTS on animals killed by heart paralysis it was found that in all cases examined immediately after death the heart was relaxed and both ventricles filled with blood; while in those examined the day after death the left ventricle was almost invariably contracted, and its contents expelled into the auricle or aorta (Luff, *Forensic Medicine*, p. 33). The importance of this observation will be obvious to all who are in the habit of attending coroners' inquests.

RIGOR MORTIS LASTS on an average twenty-four to thirty-six hours in summer, and thirty-six to forty-eight in winter. But the duration is very variable, and is affected by several well-known conditions, as well as by others not known. Thus (1) *age* is a factor, the bodies of the very old and the very young being affected earlier than those of middle age. Again (2) the *nature and temperature of the surroundings* are factors—dry cold delaying its advent and prolonging its stay. In tropical climates it comes on very early and lasts a very short time. In cold water it comes on rather quickly and lasts rather a long time. (3) The *condition of the nervous*

and muscular systems at the time of death is a very important factor. Exhaustion hastens rigor. Thus animals hunted to death stiffen almost immediately, and the bodies of soldiers killed on the field of battle after a long day's fight become rigid much more rapidly than those of their comrades killed earlier in the day while fresh and vigorous. Indeed, soldiers in the former case are sometimes found quite rigid in the exact attitude they were in at the moment of death, with rifle raised as if in the act of firing. So, too, the exhaustion consequent on the violent muscular contractions preceding death from tetanus, hydrophobia, and strychnine poisoning is followed by early rigidity. So quickly may the stage of rigor mortis come and go in some cases, that it was at one time believed not to have occurred at all in such cases.

The general rule is that the more vigorous the body and its component tissues at the moment of death, and the greater their reserve of vital energy, the longer will the advent of rigidity be delayed, and the longer its duration when it does arrive. But this rule does not hold good in the well-known though not very common phenomenon of INSTANTANEOUS RIGIDITY, or CADAVERIC SPASM, which occurs oftenest in the robust instantaneously killed. In these cases there is no period of muscular relaxation at all, and the last contractions of the living body are perpetuated in the rigidity of death. Some remarkable instances of this will be found quoted by Dr. Dixon Mann (*Forensic Medicine*, p. 48). The phenomenon has never been explained, but it is worth mentioning that *instantaneous rigor mortis has been produced experimentally* in animals by irritation of the medulla oblongata; and Brouardel, the most recent authority on the subject, states that wounds of the cervical cord, just below the bulb, may cause complete rigidity of the corpse, and stability in the position which the wounded man occupied at the moment of death. The importance of the phenomenon lies in the possibility of its affording evidence as to the *last act of the deceased*. Thus should the dead hand be found tightly grasping a weapon or bunch of weeds, the fact may be explained by supposing post-mortem rigidity to have been instantaneous; it can hardly be explained in any other way, as it would be impossible to get the dead hand, in its usual condition of relaxation, to grasp anything tightly. In this case, therefore, the inference would be that the weapon was in the hand of the deceased at the moment of death, and was not put there after death by some other person.

RIGIDITY DURING LIFE occurs in certain diseases, but is easily distinguished from rigor mortis by the following *tests*:—(1) The living body retains its temperature undiminished. (2) The ridigity of the living affects the whole body at one and the same moment, instead of passing gradually down from head to foot. (3) If a joint be forcibly bent in a body in a state of rigor mortis, that joint will not return to its former position, nor will the stiffness return; but if in a state of spasm from disease, it will return to its original position and stiffness as soon as the force is removed.

It has been assumed, apparently without any ground, that *rigor mortis in a newly-born infant* indicates that the child was born alive. It is now known, from several recorded instances, that this assumption is wrong. Rigor mortis has been found after delivery by craniotomy. In fact, it only indicates recent death, which may have taken place in utero or in vagina.

(4) OTHER CHANGES indicative of death are—

The *cornea* loses its lustre, the *eyeball* shrinks, the *pupils* do not react to light (a sign which distinguishes death from catalepsy). The *skin* loses elasticity, so that it retains marks of pressure. Later there will be found POST-MORTEM STAINS on the skin (*infra*, p. 311).

The COAGULATION OF BLOOD takes place in from five to ten minutes when it is shed. Within the dead body coagulation also takes place, but not so quickly or completely. Certain diseases and modes of death seem to influence the degree and rapidity of coagulation. These will be dealt with later.

ESTIMATE OF PERIOD ELAPSED SINCE DEATH.—The following table, embodying Devergie's conclusions, may be convenient as a way of presenting at a glance the limits of time within which death most probably occurred, from observation of the stages at which the post-mortem changes have arrived :—

CONDITION OF DEAD BODY.	EXTREME LIMITS OF TIME CONSISTENT WITH THIS CONDITION.
Body warm (more or less). Muscles relaxed (all or some).	A few minutes to twenty hours, according to degree of warmth and relaxation and other attendant circumstances.
Body quite cold. Rigor mortis well marked.	Ten hours to three days, according to existence or non-existence of the various circumstances which affect these conditions (see *supra*, p. 309).
Body quite cold. Rigor mortis quite absent. Muscles not irritable. Putrefactive changes not visible.	One to three days in summer, three to eight days in winter.
Commencing putrefaction shown by greenish discoloration of the abdomen about the umbilicus.	Six to twelve days (Devergie). But twenty-four hours to fifteen days are nearer the extreme limits of summer and winter (Taylor).

POST-MORTEM STAINS, known also as *lividities* or *hypostases*, are important to understand, because they are often ignorantly mistaken for *bruises* inflicted during life. Moreover, they often afford indisputable proof of the position in which the body lay for some time after death. They are patches of a purplish or dull red colour, of no definite size or shape, never raised above the surrounding skin, and having a well-defined, perfectly smooth outline, terminating abruptly in the white skin. They are caused by the gravitation of the blood, no longer circulating but still fluid, into the most dependent parts of the body. The vessels in these situations, including the superficial capillaries, become enlarged the more readily because they have lost their elasticity. There is, however, no extravasation or effusion. The blood is all contained within the minute vessels of the rete mucosum, the upper layer of the true skin, just above the papillæ. They may disappear and reappear in a different place if the body is moved while they are forming, *i.e.* while the blood is fluid, but once the blood is coagulated they never alter their position, nor do new ones appear. They do not form on parts that are subject to pressure or constriction, nor on the upper surfaces of the body; but the viscera will be affected, their most dependent unconstricted portions being congested. In the *stomach and intestines* this appearance may be mistaken for inflammation, but the diagnosis is easily made by observing that the post-mortem redness is not continuous, being interrupted at the folds.

The distinction between superficial post-mortem stains and BRUISES inflicted during life can be further confirmed by noticing that the cuticle is undisturbed, that the patch does not change colour until putrefaction sets in, that there are no zones of different colours round the patch, and (most important of all) *on making an incision* into the skin no extravasated blood is found, but only minute points of blood corresponding to the cut vessels —all of which, especially the last, serve to negative the idea of ante-mortem origin (see BRUISES, *infra*, p. 316).

C. PUTREFACTION.—As rigor mortis passes off, usually about the third day after death, PUTREFACTION begins to manifest itself externally, by the discoloration of certain parts and by the emission of a peculiar faint odour.

In bodies putrefying IN AIR a pale green, gradually getting darker, appears in the centre of the abdomen and spreads in all directions. Other centres of discoloration appear in succession on chest, face, legs, and arms. In bodies IN WATER the colour-changes begin in the face and spread downwards. These changes are due to the decomposition of the colouring matter of the blood (hæmoglobin), acted on by the gases of putrefaction.

The accumulation of these GASES in the tissues and cavities of the body produces numerous marked changes. The body swells all over, the abdomen is distended, the face may be unrecognisable, the eyes prominent, lips thickened, tongue protruding—appearances sometimes erroneously considered conclusive of death from strangulation. The bodies of infants may look like those of older and better-nourished children.

Bodies that have SUNK in water will often rise to the surface in a week or so, buoyed up by these gases, and may sink again after the escape of some of the gas. This flotation and submersion may be repeated several times.

The PRESSURE of these pent-up gases may force out alimentary or fœcal matter, simulating vital actions. Even the contents of a pregnant uterus have occasionally been expelled by this force, and probably many alleged movements of corpses in their coffins are due to the same cause. Post-mortem HÆMORRHAGE from wounds is undoubtedly caused by pressure of these gases on the contents of the heart and great vessels in the thorax. Bloodstained fluid and frothy BUBBLES ooze from mouth and nostrils four or five days after death. The conditions most favourable to rapid putrefaction are: *moderate warmth*, presence of *moisture*, and free access of *stagnant air*—the presence of *bacteria* being taken for granted in all cases. The most favourable TEMPERATURE is, roughly, from 70° to 100° F. Below this, the lower the temperature the slower the change, until at freezing point putrefaction ceases absolutely. Hence the much greater rapidity of change in summer than in winter. Higher temperatures tend to MUMMIFY bodies, especially if combined with rapid drying and hindrance to access of air—as, *e.g.*, by burial in hot sand.

AIR promotes putrefaction by supplying both oxygen and bacteria in greatest abundance. At a given temperature a week's exposure to air will cause as much change as a fortnight's submersion in water or eight weeks' ordinary burial in earth (Casper). The more completely a body is protected from the air by clothing, the less rapid are the changes, and the parts that are most exposed will be found most advanced. MOISTURE, whether present in the tissues or applied externally, hastens putrefaction. But entire submersion in water delays it, by preventing contact of air; and, on the other hand, moving air is less effective than stagnant, because the motion tends to deprive the body of moisture. Putrefaction is ESPECIALLY

RAPID in a body that has been in water some time and is then exposed to the air, the action of the air in such a case causing as much change in twenty-four hours as several weeks more in water would have made. Hence the necessity for early inspection in such cases.

BURIAL IN EARTH, in proportion as it excludes air, moisture, and warmth, will delay putrefaction. In various ways the MODE OF DEATH influences the rate of change. Exhausting diseases, septic conditions of the blood, lightning-shock, dropsy, asphyxia, and mechanical injuries predispose to early putrefaction. Arsenic poisoning tends to delay, and narcotics to hasten, the process. The bodies of the very young and the fat change more rapidly than the lean and the adult.

The rapid putrefaction of WOUNDS AND BRUISES should be remembered, as the effect is to make them seem more serious than they really were.

The INTERNAL ORGANS undergo putrefaction at different rates in a fairly constant order, depending upon their different degrees of density, accessibility to air, and presence of moisture. All observers are agreed that the *larynx and trachea* are the first affected, followed very quickly by *stomach and intestines*. The *heart and lungs* resist longer, and the *uterus* longest of all. The mucous membrane of the *larynx and trachea* becomes brownish red or greenish in three to eight days, according to the season of the year. A day or two later, isolated patches of a dirty red appear in the *stomach*, and may be mistaken for results of inflammation or irritant poisoning. But the redness of putrefaction pervades the whole of the tissues of the organ, and is most marked along the course of the blood vessels, while inflammation affects almost exclusively the lining membrane. Again, the blood vessels of an inflamed part are found full of blood, while they are empty in the case of post-mortem reddening.

The reddening will be suspicious if noticed soon after death, before the colour-changes of putrefaction are visible elsewhere, and if not confined to the most dependent parts, which is the mark of post-mortem staining (*supra* p. 310).

The *heart and lungs* may be found fairly fresh weeks or even months after the stomach, intestines, and liver are far advanced. *Kidney, bladder, and œsophagus* last still longer. The extraordinary resistance to putrefaction displayed by the *uterus* is often of great importance, enabling the examiner to tell with confidence not only the sex, but also whether pregnancy or recent delivery had taken place. (For more detailed information on internal putrefaction, see Mann's *Forensic Medicine*.)

ESTIMATE OF TIME OF DEATH.—The variations in the rate at which putrefactive changes take place are so very wide, and depend on so many conditions, that it is impossible to lay down any useful general rules for estimating the time that has elapsed since death. Nevertheless, by accurately noting the state of the body, and carefully considering all attendant conditions, it will always be possible for the expert to lay down with confidence certain limits—wide limits they may be—within which death must have occurred.

Rarely in our moist, cold climate does MUMMIFICATION take place—*i.e.* the drying up of the soft parts of the body into a hard, leathery condition instead of disappearing by the ordinary processes of putrefaction.

SAPONIFICATION, or the conversion of the soft parts into *adipocere*—a waxy-looking soapy substance of a dirty whitey-brown colour—not infrequently takes the place of ordinary putrefaction, especially when the body is immersed in water or buried in very damp earth.

EXAMINATION OF THE DEAD BODY.—In examining a body for medico-

legal purposes something more than a knowledge of pathology is required. It should be made always in daylight, colour-changes being so important, and, if possible, by *two* examiners—one doing the actual manual work, the other recording results, and both observing. Every observation worth remembering should be written down at the time, nothing being trusted to memory. In all cases, before the body is opened, there should be a very careful EXTERNAL EXAMINATION. If the body is seen in the spot where it was first discovered, a note should be made of its exact position and surroundings before it is moved, especially the position of the hands and the condition of the clothes—whether disordered or soiled. The temperature of the body should be taken with a thermometer (placed in rectum is best), and the presence or absence of rigidity and putrefactive changes recorded. Exposed parts, such as head, face, neck, and hands, should be scrutinised for scratches, bruises, blood-stains, and for anything held in the hands. If cuts or bullet holes are found in the clothes, they should be carefully compared with the corresponding spot on the body itself. Search the ground (or room) for weapons, bottles, etc., which may serve as a clue to the cause of death, or anything that may have been dropped in a struggle (see also *infra*, p. 316). The body may then be removed to a convenient place for further examination, where the clothes are taken off, and notes made as to height, weight (especially in the case of an infant, or where starvation or neglect is suspected), apparent age, and personal appearance. If there is any doubt as to the identity of the person, abnormalities of any kind, teeth, eyes, hair, etc., should be noted. Examine mouth, pharynx, nostrils, rectum, and vagina for presence of foreign bodies. The exact position, size, shape, and other characteristics of all wounds and bruises should be recorded, and most careful consideration given to the question of the kind of instrument with which they were caused, and whether self-inflicted, accidental, or homicidal (see *infra*, p. 320). If the body is that of a female, note the condition of the external genitals and hymen; and in the case of a newly-born infant consider whether fully developed.

In making the INTERNAL EXAMINATION, if there is any clue to the cause of death, the organ or cavity affected should be first opened. But in all medico-legal investigations as to the cause of death, the *whole* of the organs and cavities of the body must be conscientiously examined, as there is almost always a possibility, though it may be highly improbable, that death was caused, or at least accelerated, by disease of some unexplored region, and therefore the diagnosis of the medical expert is not conclusive, and judge and jury very properly hesitate to adopt it.

Unless in special cases, where extra precautions may be required, the METHOD of performing the necropsy need not differ, except in thoroughness, from that usually adopted in ordinary pathological investigations.

No persons but those who are actually engaged in making the necropsy ought to be allowed to be present, unless by order of the coroner or Home Secretary. Such an order will generally be given to any medical man selected as the representative of any person legitimately interested in the result of the examination.

MODES OF DYING.

Medical jurisprudence is only concerned indirectly with natural causes of death, in so far as some of these, from their obscurity or the suddenness of their operation, require to be distinguished from non-natural causes. The law, indeed, requires that an INQUEST shall be held in every case of "sudden death the cause of which is unknown," which covers practically all sudden

deaths where there is no medical certificate as to the cause. A post-mortem examination is generally ordered in these cases. The most frequent NATURAL CAUSES OF SUDDEN DEATHS are those which attack directly one or other of the three great functions of circulation, respiration, and innervation, such as various forms of heart disease, aneurism, embolism, pneumonia and non-expansion of the lungs (both frequently unsuspected in young children), perforation of stomach or intestines by ulceration, internal hæmorrhage, cerebral apoplexy, inhibition, etc. For the recognition of these and such-like pathological conditions, works on medicine must be consulted.

DEATH BEGINS, it is sometimes said, in one of the three great essential organs—the heart, the lungs, the brain. The corresponding modes of dying are named death by *syncope*, death by *asphyxia*, and death by *coma*, according as the primary cause is failure of the circulation, failure of respiration, or failure of brain functions.

SYNCOPE.—Failure of the heart may result from *anæmia*, *i.e.* want of the proper quantity or quality of blood, but not want of heart-power, as in excessive hæmorrhage and in some diseases; or it may result from *asthenia*, *i.e.* want of heart-power, but not necessarily want of blood, as in starvation and wasting diseases, and in inhibition or heart paralysis. Cessation of the circulation being followed instantly by cessation of the functions of both lungs and brain, somatic death is complete.

Post-mortem appearances are variable. In anæmia, especially from hæmorrhage, the heart is generally found contracted and empty. In asthenia, especially if the stoppage of the heart is sudden, both sides are generally found to contain blood. (But see *supra*, p. 309.)

ASPHYXIA.—When by any means the normal interchange in the lungs between the air and the gases of the blood is interrupted, asphyxia, partial or complete, according to the duration of the interruption, is the result. It may be brought about by anything which interferes with the working of the respiratory mechanism (*e.g.* injury to the respiratory nervous centre cutting off the motive force, or the pressure of a crowd preventing expansion of the thorax), or by anything which cuts off access of air to the lungs, as in suffocation, hanging, drowning, etc. With the cessation of respiration there commences a rapidly-increasing deterioration in the quality of the blood. Waste products, poisonous to the tissues, accumulate in it, and it is no longer capable of supplying the necessities of brain and heart, so that consciousness is abolished in a minute or two, and heart-action shortly after. The *symptoms* of sudden asphyxia in the living are: violent struggles for breath (more marked in the expiratory than in the inspiratory muscles), merging into general convulsions, then paralysis of the respiratory centre, cessation of all movements, loss of consciousness, and finally cessation of the heart-beat.

The post-mortem appearances are more or less lividity externally, most marked on lips, face, and hands. The lungs, the pulmonary artery, the right side of the heart, and the venæ cavæ are engorged with dark venous blood; the left side of the heart is comparatively empty, the brain and its membranes are congested, and the abdominal viscera also; the blood is almost black, and contains a large amount of carbonic acid gas, and therefore coagulates slowly and imperfectly.

COMA.—When, through interference with the functions of the brain, insensibility is brought about, terminating in death, we call it death by *coma*. Common instances of it are seen in concussion or compression of the brain, embolism (cutting off its blood supply), inflammation of its membranes (meningitis), abnormal conditions of the blood (uræmia, diabetes, etc.),

narcotic poisoning (opium, alcohol, etc.). The most salient feature of coma is *stupor*, gradually deepening into complete insensibility, from which the patient cannot be roused, accompanied with heavy stertorous breathing.

The *post-mortem appearances* will depend on the cause of the coma. There is nothing characteristic of coma in general.

A state of coma, evidenced only by loss of consciousness and perhaps of other brain functions, may continue for an indefinite period without causing death, until the heart ceases to act in consequence of defective innervation. As a matter of fact, the three primary functions are so intimately dependent on each other that interference with any one of them, if only it is sufficient in kind and degree, is speedily followed by cessation of the others. The selection of these three as independent and alternative modes of dying, and as if there were no others, is not scientific, but it is convenient for the present. There are, of course, other functions, known and unknown to physiologists, on the due performance of which life depends. But interference with them is not so immediately fatal, and ultimately the effects are visible in one or other of the ways described above.

Violent or Unnatural Deaths.

The violent or unnatural deaths with which the medical jurist is chiefly concerned result mostly from *mechanical injuries and wounds*, from *burns* and *scalds*, from *hanging*, *suffocation*, *drowning*, and from *poisoning*.

Mechanical Injuries and Wounds.—There is no legal definition of a "wound," but fortunately it is no longer needed, because the offence of "wounding" is now dealt with by the Statute 24 & 25 Vict. c. 100, which applies to "any grievous bodily harm" caused by "any means whatever." This will include bruises, burns, fractures, dislocations, and internal lesions where the skin is not broken, as well as all injuries coming within the surgeon's idea of a "wound." A medical witness is expected to give well-thought-out answers to all questions relating to the description of wound or injury, its probable effect on health or life, the kind of instrument with which it was caused, and, if fatal, whether inflicted before or after death, and whether accidental, suicidal, or homicidal, etc.

We have already (*supra*, p. 314) mentioned the most important general rules for the examination of dead bodies.

It should be noted that the phrase "dangerous to life" is to be understood in the sense of imminent direct danger; not remote, or contingent on complications.

Bruises or contusions include injuries of all degrees produced by blows or sudden pressure not dividing the skin, but causing subcutaneous extravasation of blood from the small vessels of the areolar tissue. The amount of effused blood varies not only with the degree of violence, but still more with the nature of the tissue affected, being greatest in soft, vascular parts. In scurvy and purpura, and in the case of "bleeders" and soft, flabby women, it may be out of all proportion to the force causing it. The extravasated blood causes a discoloration of the skin over the injured spot, or sometimes at a little distance from it. This is called technically an *ecchymosis*. When the injury is deep-seated it may not appear for several days.

The series of changes (caused by alteration in the blood pigment) which take place in the colour of a bruise sometimes enable an approximate estimate to be formed as to the time the injury was caused. In eighteen to twenty-four hours the dark-blue edge becomes lighter, and passes through shades of green, yellow, and lemon colour, the area of the dis-

coloration enlarging, and the centre remaining the darkest part. The green colour appears about the fifth or sixth day, the yellow from the eighth to the tenth, and all disappear in twelve to fourteen days.

These changes never occur in bruises inflicted on a dead body, or, to speak more accurately, the appearance of a bruise inflicted during life cannot be produced in a dead body after the blood has coagulated in the vessels, *i.e.* after two or three hours from death. But blows inflicted immediately after death, while the blood is still quite fluid, cannot be distinguished from blows given shortly before death. For the distinction between bruises and *post-mortem staining*, see *supra*, p. 311.

It should be remembered that very severe internal injuries may be caused by pressure or blows which leave no bruise or external mark of any kind. This is frequently observed in persons run over in the street, who may be found suffering from ruptured liver, spleen, or bladder.

Wounds are generally CLASSIFIED by surgeons as *incised*, *punctured*, *lacerated*, and *contused*.

INCISED wounds.—The tissues are divided by a sharp instrument drawn through them. The edges of the wound are regular and clean-cut. They will be everted and gaping, owing to retraction of the elastic skin, if the wound was inflicted during life. If inflicted immediately after death, the edges will still gape, the amount of gaping diminishing with the time elapsed since death. No retraction takes place where the wound was made several hours after death: the skin shows a mere slit in that case.

Hæmorrhage is generally considerable from an incised wound of a living person, but the amount depends on the number and size of the vessels divided. Blood-clots will be found in a recent wound.

PUNCTURED WOUNDS AND STABS are dangerous, according to their situation and depth. If made with a knife or dagger, the wound in the skin will have almost parallel edges, slightly everted, and rather shorter than the width of the knife or dagger, owing to the elasticity of the skin.

Wounds having more or less of the character of a puncture may be caused by falling on sharp-pointed fragments of pottery, glass, stones, etc., and in criminal cases the suggestion is often made that the wound in question was so caused, and was due rather to accident than to intention. Careful examination of the edges of a wound caused in this way, with a lens, if necessary, will generally show that they are jagged and uneven, and more or less bruised.

LACERATED wounds are those in which the tissues are torn instead of cut. The edges will be irregular, jagged, and swollen.

CONTUSED wounds are generally lacerated as well, and are most often caused by a heavy blow on soft tissues covering a bony surface, such as the skull or malar bone, as, for example, where the head comes against a hard object or the ground in falling backwards, or receives a blow from a cricket-ball, or even the fist. In considering whether such a wound was caused directly by the blow, or indirectly by the fall resulting from the blow,—sometimes a question of much practical importance to a prisoner,—the *situation* of the wound may be a help; or there may be found grit or road dirt in the wound, or on the clothes at the point corresponding to the wound.

Lacerated and contused wounds do not generally bleed so freely as incised and punctured, because the vessels are torn and twisted.

Careful examination of a wound will generally enable one to say with what kind of an instrument it was caused.

INJURIES BEFORE AND AFTER DEATH.—The chief distinctions between

wounds and bruises made before and those made after death have been pointed out. They depend on the following considerations :—

(1) After death the circulation of the blood ceases at once, and in a short time (two or three hours at most) the blood coagulates. Hence bleeding is at once reduced at death, and soon absolutely stopped.

(2) After death the skin and tissues lose elasticity very quickly, hence there is no gaping of post-mortem wounds.

(3) After death inflammation does not occur, nor do the tissues make any effort at repair.

INJURIES TO SPECIAL REGIONS.—Injuries to the head probably give rise to more medico-legal inquiries than injuries to any other part of the body.

SCALP wounds are not usually dangerous.

Injuries to the SKULL may be fatal directly (*a*) from *compression of the brain*, caused either by a depressed fragment of the skull or by blood effused within the cranium ; or (*b*) from *concussion* of the brain. They may be fatal indirectly in two or three weeks, by causing inflammation of the diploe and setting up septicæmia.

The symptoms of *intra-cranial effusion* of blood are those of compression of the brain—slow, laboured breathing ; slow, feeble pulse; total insensibility ; loss of reaction of pupils, which may be dilated or contracted, equal or unequal. Usually, with such effusion the skull is fractured or the brain is lacerated, but sometimes no injury to the skull, or even of the scalp, is discoverable. This is more likely to occur in habitual drunkards, or elderly people whose arteries are predisposed to rupture from slight violence, or even from mental excitement.

Where there is a history of a blow on the head, but little or nothing can be seen of it post mortem, one would hardly be justified in attributing the hæmorrhage to the blow, especially if any time had elapsed before compression symptoms came on.

There may be apparent recovery from the effects of a blow on the head, and after some hours a relapse into unconsciousness, followed by death. These cases are explained by the temporary stoppage of intra-cranial bleeding, and its subsequent recurrence owing to exertion or the returning power of the heart.

CONCUSSION of the brain, the immediate result of a blow, may be fatal. In the absence of contusion of the brain or injury to the skull, the necropsy will afford no indications of the cause of death. It must be inferred from the history and the symptoms. These would be immediate unconsciousness, irregular, fitful respiration, barely perceptible pulse, cold surface—symptoms which are also found in opium poisoning and alcoholism.

LACERATION or contusion of the brain may occur at the site of a blow, or more frequently at the base, owing to the jagged, irregular surface of the floor of the skull. The symptoms will generally be those of cerebral irritation.

FRACTURE OF THE SKULL may result not only from a direct blow on the head, but from falling on the feet or buttocks.

If a direct blow is sufficiently forcible, and done with a weapon the striking area of which is small, such as a narrow-headed hammer, it will leave a depression on the skull more or less fitting the instrument, and the surrounding bone will not be fissured. If the striking area is larger, or the force less, the depression will be irregular, and fissures will extend in different directions through the neighbouring bone.

The DIRECTION of fractures of the base and vault caused by the blow of an object of large contact area has been shown to depend on the elasticity of the skull, and to take place in accordance with known physical laws.

Thus if the compression is bilateral (as where the head is lying on the ground when struck), taking the two points of compression as poles, the fracture will begin somewhere in the line of maximum compression, namely, in the equatorial line, and either at the base or vertex, from which point it spreads towards both poles. It is thus more or less parallel to the axis of compression, or rather it is in a plane containing the axis of compression. If the compression is unilateral, the opposite side of the head being free to recede, the fracture begins at the point of impact and travels, as before, in the direction of the axis of compression, but seldom extends beyond the middle line. It is undoubtedly possible for the skull to sustain a fracture of this latter kind by coming violently into contact with hard ground when a person is knocked down.

It should be remembered that it is possible for a person who has received extremely severe injuries to the skull and brain to retain consciousness for some time, and even walk some distance.

Injuries to the SPINAL cord are most frequent in the cervical and lumbar regions. The commonest are *hæmorrhage* into the membranes, *concussion* of the cord (not infrequent in railway collisions), and *fractures* of the vertebræ, with displacement. The effects depend on the site of the damage to the cord, and the degree of it. If situated above the third cervical vertebra, it is usually fatal immediately, owing to injury to the phrenic nerves and consequent stoppage of respiration. If not fatal, concussion to the spine may not be manifested by symptoms for a considerable interval.

Injuries to the NECK are in the majority of cases cut-throat wounds—incised or stabs—of suicidal origin.

Blows over the CARDIAC REGION may cause sudden death without leaving any mark of violence. Penetrating wounds of the CHEST are dangerous but not necessarily fatal. The chief and most immediate danger is profuse internal hæmorrhage.

Laceration of LUNG, with hæmorrhage, may be caused by external violence without injury to *ribs*.

Speedily fatal injuries to the HEART may not incapacitate the person for walking some distance.

A wound of the ABDOMEN, penetrating to the peritoneal cavity, is always dangerous, and if it involve the stomach or intestines, it may readily prove fatal from hæmorrhage, inflammation, or escape of contents.

A severe blow in the EPIGASTRIC REGION has frequently caused sudden death without leaving any sign of injury, external or internal. Death is probably due to reflex paralysis of the heart, the impulse being started in the solar plexus by the shock of the blow.

The *intestines*, *spleen*, *liver*, and *bladder* have all been ruptured extensively and fatally without any external signs.

Rupture of the BLADDER may be caused by slight violence (kicks, etc.) which would not suffice to damage deeper-seated organs. A drunken man with a full bladder is especially liable to accidental rupture. It is generally fatal. Spontaneous rupture is extremely rare. Rupture of the URETHRA, with extravasation of urine, is a very common result of pathological conditions, and is generally fatal unless prompt surgical aid is given. Incised or lacerated wounds of the vulvæ, and even violent sexual intercourse, may be fatal from hæmorrhage.

Fatal wounds of the UTERUS are most frequently caused by passing sharp-pointed instruments up the vagina in the attempt to procure abortion. Peritonitis and septicæmia are very apt to follow; or death may be caused directly by hæmorrhage.

Certain diseases render the BONES brittle, and predispose them to fracture from slight violence. *General paralysis of the insane* may have this effect, and give rise to suspicions of ill-treatment. It may sometimes be important to know whether a fracture was caused BEFORE OR AFTER DEATH, and how long before or after. The question can be easily answered if the fracture took place several hours before or several hours after death, as in the former case there will be copious effusion of blood at the seat of the fracture, and in the latter case there will be none.

But a fracture caused within an hour or so after death, while the blood is still fluid, will present very much the same appearances as one caused just before death. If the fracture existed several days before death, the signs of repair of the damaged soft tissues may be discoverable, and if it existed a week or two, the repair of the bone will have commenced.

GUNSHOT WOUNDS may be directly fatal, owing to shock and hæmorrhage; or indirectly, owing to septicæmia or to an operation required in treatment.

Hæmorrhage is not usually great, unless a great vessel is wounded. The appearances and effects vary according to the nature of the projectile and the velocity with which it strikes. A small bullet with high velocity makes a small wound, both of exit and of entrance.

A larger bullet with slower velocity makes a well-defined entrance, round or oval, according as it strikes straight or obliquely. The exit is larger than the entrance, irregular, more or less lacerated, and the edges everted. The slower the velocity the greater the laceration. If discharged within a few inches of the body, the skin or clothes are probably blackened or singed by the flame and smoke, and particles of partially consumed powder may be embedded in the skin.

DISTINCTION OF ACCIDENTAL, HOMICIDAL, AND SUICIDAL WOUNDS.—This may be an easy matter, but it is often as difficult as it is important, depending upon accurate observation of minute details and a careful weighing of probabilities. The wound itself must be considered in relation to its situation, nature, direction, etc., and all the surrounding circumstances must also be considered. With regard to the *situation* of the wound, all parts of the body are accessible to a person intending to commit homicide, but certain parts of the body are inaccessible to the suicide, and certain other parts are most frequently selected by him, as being the easiest and surest for his purpose. Thus the throat and chest are oftenest selected for suicidal cuts and stabs; the temples, mouth, or heart for bullet wounds. But lunatics frequently destroy themselves by means of injuries one would have said could not be self-inflicted (see some remarkable instances in *Luff*, ii. pp. 35–38).

Stabs in the back are generally homicidal, but are not impossible to a suicide, except perhaps in the scapular region. Contused wounds of the head point to accident or homicide—the latter if there are bruises on the hands also, or if there is more than one such injury. Indeed, contused wounds anywhere are seldom suicidal. The possibility of retaining consciousness and the power of walking and speaking for some seconds after desperate injuries to the head is proved by several recorded cases (see Mann, p. 286).

Suicidal wounds of the throat are generally situated above the thyroid cartilage, and may be very extensive, severing the great vessels at both sides of the neck.

The *direction* is generally from left to right in such wounds, and slightly downwards, beginning at the angle of the jaw on the left and ending on the

right about the level of the thyroid cartilage, and becoming shallower towards its termination, the skin being the last structure divided. If the suicide was left-handed, the direction would probably be reversed. Blood, but not cuts, will generally be found on one or other of the suicide's hands. Cuts on the hands will probably be found if the victim was able to offer resistance to his murderer. Suicidal stabs by right-handed persons are generally from right to left, and from above downwards. Wounds taking a direction from below upwards are strongly suggestive of homicide.

Besides these indications supplied by the wound itself, there are others which should be looked for in the *surrounding circumstances*. Such are: the position of the body; the position of the weapon; the presence of blood (wet or dry) and of hair or other substances on the weapon; the presence of foreign substances in the wound; marks of blood on clothing, ground, furniture, walls, etc.; footprints near the body.

It should be remembered that even a mortal wound of head or heart or throat does not invariably deprive the person immediately of consciousness and muscular power, so that the body of a suicide may possibly be at some little distance from the place where the fatal wound was inflicted, and the weapon may be thrown away or even, in rare cases, concealed. There may be very little *stain* of blood on a knife or dagger used for stabbing, because, if rapidly withdrawn, the lips of the wound wipe it nearly clean, and the clothing through which it passes will complete the cleaning. The colour of the stain on the weapon is often yellow rather than red. If a small artery is severed during life, the blood from it may *spurt* to a considerable distance, producing a number of minute spots. If much blood has flowed on to the ground, it may have been trodden in, and bloody footmarks may be found near. The soles of the feet of the dead person should therefore be examined. Bloodstained finger-marks should be searched for. If a weapon is found *tightly grasped* in the hand of the deceased, it is strongly suggestive of suicide (see *supra*, p. 310).

CAUSES OF DEATH FROM WOUNDS, ETC.—Wounds and mechanical injuries may be fatal *directly* or *indirectly*—directly, by HÆMORRHAGE or SHOCK, or both combined; indirectly, by complications. Mere *loss of blood* causes syncope. If the loss is sudden and copious, death is rapid. Certain persons are constitutionally more liable to profuse hæmorrhage from slight causes. *Shock* is defined as "a condition of sudden depression of the whole of the functions of the body, due to powerful impressions on the system by physical injury or mental emotion" (Quain's *Dict. of Med.*). If sufficiently severe it causes death, but its exact *modus operandi* is not satisfactorily ascertained. Probably it acts by paralysing the heart.

Shock usually follows extensive lacerations and especially crushings, such as result from machinery and railway accidents, and it is frequent after severe burns, lightning-stroke, and blows on the abdomen. Concussion of the brain or spinal cord may be a form of shock. It may result from injuries which leave no mark, or from a number of small injuries, none of which alone would cause it. In very severe mechanical injuries to vital organs (brain, heart, lungs), death may be due to hæmorrhage or to shock, and is generally due to both combined. Hæmorrhage always aggravates shock.

Death may be the INDIRECT RESULT of wounds and injuries through any of the ordinary complications and sequelæ, such as erysipelas, tetanus, septicæmia, etc. The legal consequences to the person who gave the wound are the same as if death had occurred directly from it, provided that death occurs within a year and a day from the wounding. Beyond that period

the law does not hold anyone criminally responsible for the death, although it may be clearly traceable to the injury.

DEATH FOLLOWING A NECESSARY SURGICAL OPERATION.—Here, as in all cases of deaths indirectly due to injuries, the principle of the law is that a person who criminally wounds another must abide the full consequences of his act, including the risks of operations which may become necessary in the course of treatment—provided that the operation was in the opinion of the medical attendant *necessary to save life*, and was performed with *reasonable skill and care*. In such a case the medical attendant is free from responsibility. The same principles apply to the case where the surgeon omits to perform an operation which it is alleged might have saved life. But if death results from unskilful or negligent treatment, the original injury not having been of a dangerous character, the person who caused the injury would be relieved of responsibility. The same rules apply to deaths from anæsthetics administered for the performance of an operation on a wound.

MALAPRAXIS.—The want of reasonable skill and care on the part of a medical practitioner, whether qualified or not, whereby damage to life, limb, or health is done to the person under treatment, may give rise to a civil action for damages, or a criminal prosecution for manslaughter. In civil actions everything depends on the interpretation of the qualifying word *reasonable*. There is no absolute standard of what is reasonable, and each case must be judged on its merits. The charge of manslaughter can only be sustained where death has resulted from *gross* culpable negligence, ignorance, or want of skill.

BURNS AND SCALDS are dangerous in proportion to the extent of surface affected, the depth to which the tissues are injured, and the position of the injury. If a superficial area equal to one-third of the surface of the body be destroyed, recovery is almost hopeless. They are more dangerous on the trunk and head than on the limbs. They are especially dangerous to the young and weak.

DEATH FROM FIRE may be due to—

(1) *Suffocation* from want of air, or *poisoning* by carbonic acid gas (CO_2) or carbon monoxide (CO). These are commonly the causes when the burning takes place in a closed space, such as a room. After poisoning by CO the blood is a bright cherry red. In the other cases it is dark.

(2) *Shock*, the direct effect of the heat.

(3) *Stupor*, passing into coma resembling that of narcotic poisoning.

(4) Remote or *secondary effects*, such as enteritis, or duodenal ulceration; bronchitis or pneumonia; absorption of the products of inflammation and suppuration.

It seems probable, from recent observations, that the cause of early death from burns and scalds is the injury done by the heat to the red corpuscles of the blood, and the consequent interference with their functions, rather than injury to vessels, nerves, or skin functions.

POST-MORTEM APPEARANCES.—Radiant heat causes a whitish appearance of the skin; flame blackens the surface, and may blister; scalds generally produce blisters and a sodden appearance. Clothing protects the skin, unless it takes fire itself. The dead bodies are generally found contorted and stiff — from the coagulating of albuminates by the heat — not from the writhings of pain. The brain and lungs are often found much shrunken; the heart is filled with blood. The blood itself is often a bright cherry red, which is sometimes the result of carbonic oxide poisoning (proving that deceased must have breathed while the fire was in progress),

and is sometimes independent of carbonic oxide poisoning. Murderers sometimes attempt to burn the bodies of their victims, and it may be sometimes possible to say whether a burn was inflicted BEFORE DEATH or AFTER. If there are blisters on the skin, it is almost certain that the burns were inflicted either during life or within twenty-four hours after death; while if there is fluid in the blisters, it will be extremely rich in albumen if caused during life, but poor and watery if produced after death.

A bright red line round the blister, particles of soot, etc., in the larynx or trachea, and an abnormal amount of CO_2 in the blood, are also evidences of life during the fire.

Cracks and fissures very like incised wounds are often found. They result simply from the heat.

LIGHTNING may cause death without any sign of injury at all, or it may cause very extensive burns and violent mechanical injuries, even tearing off clothes, boots, etc., and hurling them to a distance. Death is generally instantaneous, from shock to the nervous system. *Post mortem* there are no characteristic appearances internally. Externally there may be something suggestive, such as burns, peculiar wounds, arborescent erythematous reddening on the skin, fusion of metallic substances about the body, etc.

COLD exercises a depressing effect on all the functions of the body. Its effects are aggravated by fatigue and exhaustion, and by intoxication. The very young are specially susceptible. If it is sufficiently severe and long-continued there is gradual loss of energies, physical and mental, followed by stupor, deepening into profound sleep, during which the vital functions gradually cease, the capacity of the hæmoglobin to give up its oxygen to the tissues being interfered with by the very low temperature.

The *post-mortem* appearances are not characteristic. There may be cherry red post-mortem staining on parts exposed; but these are no proof of death by cold, but only that the body was exposed to cold after death. Internally both sides of the heart are generally full, and the brain and the membranes congested.

STARVATION may be *acute*, implying total deprivation of food; or *chronic*, resulting from insufficient or improper food, as in times of famine, and in the case of infants whose attendants are ignorant or criminal. Chronic starvation is frequently the immediate cause of death in certain diseases, owing either to mechanical obstruction to the entrance of food into the stomach, or to interference with the processes of digestion and assimilation.

In acute starvation the sense of hunger passes off in thirty-six to forty-eight hours of fasting. But there is extreme thirst. Weakness and emaciation are progressive. The skin becomes pale, dry, hard, and loose. Later, stains of a dirty brown colour and offensive odour appear on it. The eyes are sunken, the cheek-bones prominent, the abdomen retracted. The intellect may remain clear to the end, but hallucinations are not uncommon. Delirium, however, is rare. The length of time that a person can live without food or drink varies. The limit for a robust healthy man is probably twelve to fourteen days. For young children or debilitated persons, or when exposed to cold and fatigue, the limit would be much shorter Access to drinking water lengthens the period of survival very considerably —forty and even sixty days having been recorded.

Post mortem, in addition to the appearances during life described above, there will be found a marked absence of fat everywhere, including the omentum; an atrophied and semi-translucent condition of the intestines and stomach, which are empty or contain a little bile-stained fluid and

perhaps hard, dry fæces in the large bowel; the liver and pancreas are small; the gall-bladder distended with bile.

Homicidal starvation is extremely rare except in baby-farms, where evidence of criminal intention is difficult to procure.

VIOLENT DEATHS DUE CHIEFLY TO ASPHYXIA (*supra*, p. 315).—This category comprises the important group of deaths from *hanging*, *strangulation*, *suffocation*, and *drowning*.

In HANGING, death may be chiefly due to asphyxia, but another important factor usually enters into the causation, namely, the constriction of the vessels of the neck arresting more or less the intra-cranial circulation. This factor by itself may produce rapid unconsciousness, followed by death, and it is generally combined with asphyxia in cases of hanging. Rupture of intra-cranial vessels is very rare, and in fact there is no increase of blood-pressure.

The sudden onset of unconsciousness, due to the partial or complete arrest of the circulation in the brain, explains why the victims of suicidal hanging make no effort to save themselves, even when they might do so easily. The heart beats for several minutes (as many as fifteen has been observed) after respiration has ceased, but death is painless.

The *post-mortem* appearances are those of asphyxia in general, modified by those of the particular means used in producing the asphyxia. The *face* is pale (at least in suicidal cases); *tongue* protruded in about half the cases; *saliva* trickles down the chin; the *mark on the neck* made by the rope is generally limited to the front half of the neck, running between the hyoid bone and thyroid cartilage, and sloping upwards under the ears, where it probably terminates. The mucous membrane of the *larynx and trachea* is congested, and so is that of the stomach very often, giving rise to suspicion of irritant poisoning. The condition of *brain and lung* is inconstant. Sometimes the one is engorged, sometimes the other, sometimes both are normal. This inconstancy seems to be dependent on the degree of expansion of the thorax at the moment that access of air is cut off.

The question, WAS DEATH DUE TO HANGING? can seldom be confidently answered from purely medical considerations, because none of the signs above mentioned are conclusive, and most of them may be absent. The saliva trickling from the mouth is said to be one of the best proofs of death from hanging, but its absence does not exclude this cause of death.

The mere finding of the body hung up, or with a mark of a rope round the neck, is not enough, because the body may have been so placed by a murderer in order to make it look like suicide. In such a case there would almost certainly be other marks of violence, or suspicious circumstances not consistent with suicide.

Accidental hanging is very rare, and *homicidal* rarer still. Yet both are possible, and have occurred.

Hanging is the commonest of all forms of *suicide*. Suspension need not be complete. The feet and even the nates have been found resting on the floor. Such cases are explained (*supra*, p. 324) by the rapid onset of insensibility. An appearance of homicide may be given to a suicide by the suicide attempting to destroy himself first in some other way, or by tying his hands or feet together.

STRANGULATION.—When fatal asphyxia is caused by constriction of the neck without suspension of the body, it is called strangulation. The immediate cause of death is the same as in hanging, and the post-mortem appearances are similar. The *mark* on the neck varies according to the sort of ligature used and the means by which the strangulation was

produced. It is generally more horizontal and lower down than in hanging; it goes more completely round the neck; and the skin will probably be abraded and ecchymosed.

Accidental strangulation is rare; suicidal rarer; homicidal is relatively frequent.

The distinctive feature of HOMICIDAL STRANGULATION, when compared with accidental or suicidal, is *excessive local injury*. Criminals generally use more violence than is necessary. Thus fractures of the thyroid and cricoid cartilages, or of the hyoid bone, are strongly suggestive of homicide. Signs of general violence, if they exist, must be considered and accounted for—scratches and slight abrasions about the neck may have been caused by a suicide in adjusting the rope; or he may have attempted to kill himself in some other way before hanging.

THROTTLING is a variety of homicidal strangulation where the hands are used in lieu of a ligature. The marks of the fingers or nails may be left on the throat—the thumb on one side and the fingers on the other—in the form of superficial bruises due to the pressure of the hand. After some time they may become dry and parchmenty-looking. General signs of injury caused by struggling with an assailant and perhaps falling to the ground will generally be present if the victim was capable of offering a vigorous resistance.

SUFFOCATION.—When air is prevented from entering the lungs by any means other than external constriction of the throat, or submersion in water, suffocation is the result.

Thus, apart from disease, suffocation may be caused by *foreign bodies* (*e.g.* food) blocking the air-passages; by forcible *compression of the chest* (as in crowds) preventing expansion of the lungs; by *covering the mouth and nose* (smothering), as in overlaying of infants. A very minute foreign body may cause spasmodic closure of the glottis and rapid death by *syncope*—none of the usual signs of death by asphyxia being found post mortem. Infants have been suffocated by having pieces of paper, sand, artificial teats, etc., pushed into the throat, as well as by compression of the chest, and by smothering with bedclothes, etc. The latter may be intentional or accidental, and there is of course no external sign to distinguish the intention. It may be caused by lying on the child, or by keeping it too tightly against the breast when suckling, or by allowing the clothes to get over its face. Epileptics are not infrequently smothered by the bedclothes in a fit, or by falling down in such a position that they cannot breathe.

Suicidal suffocation appears to be unknown, except in lunatics.

The *post-mortem* appearances of suffocation depend upon the means by which it is produced. Usually there is little or no external indication. The signs of asphyxia may or may not be present internally. Their absence does not disprove suffocation. The air-passages should always be searched for foreign bodies.

DROWNING.—DEATH BY DROWNING results from asphyxia caused by submersion, continuous or intermittent, of the mouth and nostrils in water or other fluid. Access of air is thus cut off either suddenly and completely, or gradually; and, in addition, an irrespirable medium (water, etc.) is drawn into the lungs in place of air. For some seconds the automatic movements of respiration are instinctively resisted, but the stimulation of the respiratory centres by the unaërated blood quickly overcomes this resistance, and respiratory movements take place, water being drawn in instead of air—or water and air alternately if submersion is intermittent.

Submersion in water is more quickly fatal than simple suffocation, and,

if not carried so far as to cause immediate death, is more difficult to recover from. The reason for this is twofold—(1) the injury done to the lung by the water taken into it, and (2) the formation of a quantity of fine froth in the bronchi impeding access of air when resuscitation is attempted.

Death from falling into water is not always due to asphyxia. Fatal *syncope* at the moment of falling in occurs occasionally; or *shock* from striking the water or the bottom may be the cause of death. In such cases the signs of drowning will not be present. Neither will they be present in a body which was dead before immersion.

When death takes place from drowning in the ordinary way, submersion has generally been *intermittent*. The human body is slightly lighter than water, owing to its fat and the presence of air in the lungs; so that even a person who cannot swim generally comes to the surface once or oftener before death. But as water takes the place of air in the lungs, the body *sinks* unless very fat, and remains submerged until the gases of putrefaction are sufficiently developed to cause *flotation*, which generally takes place within a week in temperate climates (see *supra*, p. 312).

Post-mortem appearances.—If putrefactive changes are advanced, it is scarcely possible to give a positive opinion that death was due to drowning. But in a body removed from the water within a few hours of death, and examined immediately or within, at most, twenty-four hours, the signs are well marked.

The most important of these are—

EXTERNALLY.—*Fine froth* (like soap-lather) about the lips and nostrils. It is not found after immersion for more than three or four days, and it disappears shortly after the removal of the body from the water. It can sometimes be made to appear at the mouth by pressure on the chest.

INTERNALLY.—The *volume* of the lungs is increased; the *consistency* is doughy and water-logged, pitting on pressure; *water and froth* exude on section; there is water in the *pleural* cavities, and fine froth in the *bronchi* and *trachea*; the *blood* is diluted with water; and there is water in the *stomach*

The FROTH spoken of is composed of a mixture of the drowning medium with air from the lungs, mucus, and sometimes blood, all churned up by the involuntary respiratory movements. It is most abundant when the process of drowning has been long, and submersion intermittent. The mucus gives tenacity to the fine bubbles of which it is composed. When found, it is almost conclusive of death from drowning.

The condition known as *goose-skin* is often present, but is found in sudden death from other forms of violence. It is due to instantaneous cadaveric rigidity in the small muscles of the skin when in a state of contraction—a vital reaction. The bleached, sodden condition of the soles and palms only shows that the body has been in water at least twelve hours.

Water in the STOMACH is generally the result of swallowing during the death-struggle. But experiments show that it may find its way into the stomach of a dead body, immersed for three or four days. The longer the body has lain in water the less valuable is this sign. On the other hand, it is not invariably present after undoubted drowning. The condition of the HEART and BRAIN is not constant, but is consistent with death from other forms of asphyxia.

When a dead body is found in water, the medico-legal problems to be solved are whether death was due to drowning or to some other cause, and WHETHER ACCIDENTAL, SUICIDAL, OR HOMICIDAL.

The first of these questions must be examined by the light of the signs

already discussed. With regard to the last,—drowning is an everyday accident, a favourite form of suicide (especially with women), and a rare form of homicide, confined chiefly to infants, and almost unknown amongst adult males. If no signs of violence or other circumstances of suspicion come to light, accident or suicide must be assumed, and medical evidence can give little help in deciding which of these alternatives is the true one. But when there are injuries or marks of violence, suspicion is excited. There are, however, many ways in which these may be explained without assuming that a crime has been committed. They may have been caused by the dead person himself. Suicides not infrequently drown themselves after unsuccessful attempts to destroy life by other means. They may fasten weights to their feet, or tie hands or feet together, and drown themselves in the most unlikely places—shallow pools, cisterns, etc. Again, injuries may occur at the moment of falling into the water accidentally, or plunging in intentionally, *e.g.* from a height. But injuries found on dead bodies are most often of post-mortem origin—proof of which, of course, negatives the suspicion that they were due to foul play. Such post-mortem injuries may be caused by passing boats, or by the body being carried by the current against stakes, sharp stones, etc., or through lock gates, and in various other ways. When the skin dries, bruises not noticed before may become apparent.

The length of TIME REQUIRED FOR DEATH by drowning is about three to five minutes continuous submersion. Insensibility from asphyxia comes on in sixty to ninety seconds, but the heart continues to beat some minutes longer, and while it does so resuscitation is possible. But there is little hope of recovery after four minutes' continuous submersion. We may briefly mention the indications for TREATMENT of the apparently drowned—

1. To clear the air-passages of water and mucus.
2. To aid respiration artificially.
3. To restore the lost animal heat by external warmth.
4. To rouse the nervous mechanisms of respiration and circulation.

DEATH FROM POISONING.—See article TOXICOLOGY.

QUESTIONS CONNECTED WITH THE ORGANS OF GENERATION.

At the outset it is necessary to impress upon medical men who are called upon to make examinations of living persons in connection with these questions, that they must in all cases obtain the person's express consent, without which they render themselves liable to prosecution for indecent assault, *even when acting under the order of a magistrate or judge.* They ought also in fairness to explain that the result of the examination may be used against as well as for such person. For their own safety, consent ought to be given in the presence of a third party.

It may become necessary for legal purposes to ascertain the existence or non-existence of PREGNANCY in a living woman in the following cases,—(1) When pregnancy is pleaded as a bar to the execution of judgment of death; (2) when a woman, whose husband is recently dead, claims to be pregnant with an heir to the estate, the heir-at-law may demand proofs of pregnancy, to protect himself against a spurious heir; (3) when pregnancy is asserted as a ground for increased damages in a case of seduction, or of the death of a husband, or where the charge of pregnancy constitutes a libel.

For a detailed description of the common signs of pregnancy and their value as evidence, the reader must consult a treatise on midwifery. But there are a few general remarks which may be of use to lawyers and medical men alike.

Most of the signs of pregnancy in the living woman are inconclusive, and some are purely subjective, *i.e.* their existence can only be known by the woman herself, and cannot be ascertained by the medical man directly. The cessation of the menses and the sensation of "quickening" are open to this double objection, and their alleged existence is therefore of no value in most cases. The changes which usually take place in the breasts, the abdomen, the cervix, and the vagina are objective signs, it is true, but each of them may exist, or be closely simulated, without pregnancy. The same is true of the "uterine souffle," and even of "ballottement." A combination of several of these signs might carry conviction to the mind of the examiner, but would rarely justify him in swearing positively to it. There are, however, TWO SIGNS which, if undoubtedly present, are infallible—(1) the *sounds of the fœtal heart*, and (2) the presence and *movements* of the fœtal members felt through the abdominal wall. From the eighteenth or twentieth week the fœtal heart begins to be heard distinctly though faintly by the trained ear, beating at the rate of 120 to 160 per minute, and sounding like the rapid ticking of a watch at a distance. It cannot, however, always be made out, owing to fatness of the abdominal wall or other causes. Its absence, therefore, does not disprove pregnancy. By palpation of the abdominal wall the head and limbs of the fœtus may often be distinguished, and vigorous movements may be felt. If the child is dead, of course, neither heart-beat nor movements would exist, but the fœtal members might be recognisable. The infallible signs are not present before the eighteenth week at earliest, and therefore no positive evidence can be expected before that time, and they may not be well-marked until later.

The additional signs of pregnancy obtainable *post mortem* are the presence in the uterus of an ovum with villi, or of a fœtus with placental attachment, proving pregnancy at the time of death.

The presence of the abnormal products of conception, known as *moles*, would prove impregnation, with subsequent death of the ovum in an early stage, some time before the death of the woman. The so-called "true corpus luteum" may be absent in pregnancy, or present where there is no pregnancy, and is therefore of no diagnostic value in medico-legal questions.

The SIGNS OF RECENT DELIVERY are of importance in relation to infanticide, concealment of birth, feigned delivery, and imputations against the chastity of an unmarried woman.

The signs of *delivery* at full time are well-marked for two or three days. After a week they may be difficult to recognise, and after a fortnight they cannot be relied on to prove more than delivery at some previous time. Within two or three days the signs would be something like the following:—General languor, dark circles under the eyes, temperature slightly elevated (generally), skin moist, breasts full (and containing colostrum, not true milk, the difference being recognisable under the miscroscope); abdominal walls flaccid and wrinkled; the uterus felt through them as a hard round ball; cervix soft and open, its lips bruised or torn; vagina dilated, hymen represented only by "carunculæ myrtiformes," vulvæ tumid, posterior commissure torn; lochial discharge almost pure blood for the first two days, changing to red serous fluid, and later becoming yellowish or greenish.

If death has taken place soon after delivery, the uterus will be much enlarged and show unmistakable indications.

The SIGNS OF DELIVERY AT SOME REMOTE PERIOD consist in certain

appearances in the breasts, the abdominal wall, the cervix and os-uteri, and the vagina. They may be well marked years after, especially in those who have borne many children, or they may be difficult to detect in three or four months. The presence of the *hymen* only proves that no mature infant can have been born *per vias naturales*. The same thing is proved by the existence of the posterior commissure intact. But the absence of the hymen and the presence of a scar in the posterior commissure do not prove delivery.

CRIMINAL ABORTION.—In medical literature abortion means the expulsion of the embryo or fœtus before it has reached the viable stage, *i.e.* before the seventh month. In law, the crime of procuring abortion consists in unlawfully procuring the expulsion of the contents of the gravid uterus at any period of gestation short of full term.

The crime is now defined by the Statute 24 & 25 Vict. c. 100, s. 58, as follows:—

> Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent; and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony . . . (s. 58).

And by sec. 59—

> Any person supplying or procuring any poison, etc. . . . (as in preceding section), knowing that the same is intended to be unlawfully used for procuring miscarriage, whether the woman be or be not with child, is guilty of a misdemeanour.

If, in consequence of attempts to procure abortion, the woman die, it is murder in the person who made the attempt.

It is sufficient (and probably necessary) that the poison or noxious thing administered is noxious in the quantity in which it was administered.

The statute does not expressly exempt a medical man inducing labour prematurely for medical reasons; but if these reasons were held and acted on *bonâ fide*, and there was no unlawful motive, no conviction would follow. A medical man is nevertheless liable to be called on to prove his *bona fides*, and for this reason should always explain to the woman and her friends what he proposes to do, and if possible obtain the concurrence of another medical man as to the necessity for the operation.

The MEANS used for procuring criminal abortion are generally DRUGS administered by the mouth, or MECHANICAL means applied *per vaginam*. The drugs most frequently used belong either to the class of *emmenagogues* (promoting the menstrual flow), or to that of *ecbolics* (emptying the uterus). With regard to these it is extremely doubtful if there is a single known drug which acts as a true abortifacient or ecbolic on the healthy uterus. Many, if not all, of the drugs which have a reputation for inducing miscarriage succeed only when given in poisonous doses, and abortion is only one of the consequences of the general toxic effects of the drug, and might have been equally well produced by almost any irritant poison. Most of them are vegetable irritants, and abortion produced by them is generally, in fact, accompanied by the death of the patient from poisoning.

Even of *ergot*, the nearest approach to a true ecbolic, this may be said, unless miscarriage is threatening from some other cause or pregnancy is well advanced. During labour, and probably for some weeks before full term, ergot has the power of so augmenting the force of the natural con-

tractions of the uterus as to hasten the expulsion of the contents. But in the early months certainly it seems to be unable to do so.

Nevertheless, there is a deep-seated popular belief in the abortifacient virtues of ergot and *savin*, while many emmenagogues and even drastic purgatives are believed to favour miscarriage. Emmenagogues, real or supposed, may of course be administered with innocent intentions to restore the menses when their cessation is attributed to causes other than pregnancy; but drugs like savin and ergot, which have no such reputation, must be regarded with grave suspicion, even though it is now known that their sinister reputation is scarcely deserved.

Sometimes women endeavour to bring on a miscarriage by *general violence*, such as excessive and exhausting exercise, lifting heavy weights, jumping from a height, and so on. But these efforts to disturb the contents of the womb are generally quite ineffectual, at least until the later months.

All these devices having failed, a woman bent on inducing a miscarriage is tempted to try more DIRECT MECHANICAL MEANS. If she operates on herself or applies to a very ignorant person, the means used will probably be a pointed stick, or piece of wire, or a hairpin, "passed up the private parts until blood comes." Most likely the uterus or cervix is perforated or lacerated, profuse hæmorrhage, or septic inflammation may follow, and either the patient dies, or skilled medical aid is called in in the hope of saving her life, and then the truth is discovered. But abortion may be, and probably is, largely practised by professional abortionists possessed of more or less skill. If successful, the operation causes but little disturbance to health, its results are indistinguishable from accidental miscarriage, which happens to most women, and all trace of it has disappeared in a few days. Honourable medical men thrown off their guard by a specious story of uterine displacement, have frequently been entrapped into passing a sound into the gravid uterus, with the usual but not invariable result of causing abortion. Where death results after abortion, it is generally due to hæmorrhage or puerperal fever caused by retention of the products of conception, or the use of infected instruments. Laceration of the parts, which is so common in criminal attempts to procure abortion, leaves an open door for the entrance of the toxic products of pathogenic organisms. But it should be remembered that death from the same causes may follow ordinary miscarriage where no unlawful means to procure it have been used.

The SIGNS OF RECENT ABORTION IN THE LIVING vary with the stage of pregnancy reached and the interval that has elapsed since abortion took place. Apart from injuries, the condition of the vagina and uterus after abortion in the first or second month is not distinguishable from that during an ordinary menstrual period. The more advanced the pregnancy is the more nearly will the signs of abortion resemble those of delivery at term. In most cases of alleged criminal attempts little information can be expected from examination, unless it is made within twenty-four hours.

In examining *post mortem*, the uterus with the vagina attached should be carefully removed, the vagina slit open, and the uterus scrutinised for punctures, lacerations, inflammatory products—all of which should be carefully noted as to their situation, direction, etc. It is necessary to be on one's guard against the deceptive appearance of injury, bruising, etc., which the uterus of a woman recently delivered in the natural way presents. The stomach and intestines, the kidneys and bladder, should be examined also for signs of irritant poisoning, such as usually results from the administration of ecbolics. If an embryo is found, its age should be estimated.

INFANTICIDE is the killing of a newly-born child, and is regarded by the

English law as ordinary homicide. The expert medical evidence is all-important in such cases, because it is generally by that evidence alone that it can be shown that the child was born alive—an essential point, difficult often to prove, and one which never arises in other kinds of murder. The law will not assume that the child was born alive; the burden of proof of this is thrown on the prosecution. The crime of infanticide cannot, under our law, be committed unless and until the child is fully born, by which is meant that it is *wholly* outside the mother's body. If the child is killed when half expelled from the maternal parts, it is not born alive, and no crime known to our law is committed. The medico-legal questions involved relate (1) to the alleged *mother*—whether she has been delivered of a child within a period corresponding to the apparent time since the infant's birth; and (2) to the *child.*

As to the alleged mother, the *signs of recent delivery* have been already discussed (*supra*, p. 328).

With regard to the child the main questions are—

(1) Was the child viable?

(2) Was it born alive?

(3) What was the cause of death?

I. The charge of infanticide may be sustained although the child is proved to have been not VIABLE, *i.e.* capable of continued independent existence, provided it can be proved to have been born alive. But if not viable, it would be almost impossible to prove that it was killed after birth and while still living. To be viable it must have completed at least its sixth month of intra-uterine existence.

II. WAS THE CHILD BORN ALIVE? The difficulty which so frequently exists in giving a confident answer to this question arises from the absence of any sign by which to distinguish death just before birth (in the strict legal sense) from death just after birth. The medical witness must base his conclusions chiefly on the *evidence supplied by the lungs.* If the child has never breathed at all, the lungs will show the fact beyond all reasonable doubt, and, in the absence of evidence to the contrary, there is the strongest presumption of still-birth. But the converse is not true. Proof that the child has breathed is not proof that it was born alive, because it is fully established that a child can breathe and cry as soon as its head is outside the vaginal passage, and therefore before it is legally born, although such breathing does not produce the full effects normally resulting from respiration freely performed after complete expulsion. In the latter case well-marked changes occur in the *volume*, the *colour*, the condition of the *air-cells*, the *consistency* and *appearance* and the *specific gravity* of the lungs in consequence of respiration. These changes require some little time to develop fully, and therefore where respiration has been carried on for a very short time, or very feebly, the degree to which these lung changes have developed is a rough guide to the degree to which the function of respiration has been carried on. We must now consider in some detail the nature and significance of these lung changes.

In a child who has not breathed at all, the lungs are invisible on opening the thorax until the heart and thymus are drawn aside. They are at the back of the chest, and come forward along the ribs only for one-third of the length of the ribs. But when expanded to their full volume by respiration, they come right to the front, so as almost to cover the heart. Before expansion, the level of the diaphragm may reach to the fifth rib instead of the seventh. Exceptionally feeble respiration may have gone on for some time without much expansion.

The *colour* of the lung before respiration is a pale brown or brownish red, resembling that of the liver, only paler. The surface is not mottled, but uniform. After full respiration, it will be a light red colour, owing to the increased circulation, and may be mottled. The colour alters with exposure to air—becomes red from oxygenation of the blood—and should therefore be observed at once on opening the thorax.

The *distension of the alveoli* (or air-cells) with air proves absolutely that air has entered the lungs—that is to say, that respiration has taken place, unless (which is rarely a possible alternative) air has been artificially introduced. This distension of the alveoli may pervade the whole lung, but if the child was feeble, or did not long survive, the distended air-cells may only be found in small patches, polygonal in shape, and bright red in colour.

As to *consistency*, the fœtal lung not only looks like liver, but feels like it—firm, compact—and cuts like it. It does not, like fully expanded lung, *crepitate* when squeezed, nor send up *bubbles* when compressed under water, nor exude blood-stained *froth* when cut.

The *specific gravity* of the lung, after full expansion by respiration, is lowered from 1·05 to 0·95, owing to the inflation of the air-cells. Hence fœtal lung sinks, while lung that has been freely used for breathing floats. On this fact depends the following well-known *test.*

THE HYDROSTATIC TEST.—To apply it, the two lungs are removed together and placed in a vessel containing water at the ordinary temperature. If they float readily, they are well filled with air, and it is concluded that breathing has been fully in operation. If they sink readily, the inference is that they are very little, if at all, inflated, and were very little, if at all, used for breathing. If they float almost submerged, the explanation is probably that they are only partly inflated, and that breathing has been performed for a short time, or only feebly.

The test may be repeated with each lung separately, and with small separate portions of each lung if necessary, so as to ascertain what portions do or do not float.

If there is any reason to suppose that gases of decomposition are present, which is unlikely, unless signs of decomposition are well marked in other parts of the body, the pieces that float should be wrapped in a cloth and subjected to steady pressure equal, say, to that of a man's weight, and again placed in water to see whether they float or sink; the reason for this being that gases of decomposition will be driven out by such pressure, whereas the air introduced into the air-cells by respiration cannot be expelled by any force short of one which causes absolute disintegration of the tissues. Hence, if the lung, or any portion of it, still floats, the floatation is due to inspired air, and the conclusion is justified that the infant breathed, though we cannot say that it was fully born at the time.

The sinking of the lung, and every portion of it, on the other hand, does not justify the conclusion that the infant never breathed, because disease (*e.g.* pneumonia) may cause it to sink, and because it is known that an infant may (in rare cases) live and breathe for hours and even days, and yet the lung be absolutely unexpanded. To sum up:—

(*a*) The hydrostatic test is not a test of live birth but of respiration, which may have occurred during birth, and have ceased before the child was in the legal sense "born." Nevertheless, as it generally requires at least some hours, and, according to some authorities, as much as a day or two after birth for the lungs of an infant to become fully expanded, there is a *presumption* amounting almost to certainty, that where lungs are found

fully expanded the infant must have lived an appreciable time after complete legal birth.

(*b*) The floating of lung may be caused by putrefactive gases, if putrefaction is present in the lungs. These gases can, however, be expelled by moderate pressure, which will not displace inspired air in the air-cells. The hydrostatic test can therefore be applied after the putrefactive gases have been expelled. Too much confidence, however, ought not to be placed in the test under these conditions.

(*c*) On the other hand, the lung of an infant that has lived and breathed for a considerable time after birth, may yet sink owing to disease, or owing to abnormal feebleness of respiration, which may leave a large portion, or even, in rare cases, the whole of both lungs unexpanded, and indistinguishable from fœtal lung.

The hydrostatic test applied to the lungs, may be supplemented by BRESLAU'S "*second life test*," based upon the fact that the *stomach and intestines* of children who have never breathed sink in water; whereas, in children who have lived and breathed, the stomach, and, if they have lived long enough, the duodenum also, will float, owing to the air swallowed during the first gasping respirations. This air is found in the form of froth, mingled with the contents of the stomach. This test also appears to prove respiration only. But if the air has penetrated to the intestines, there is a strong probability that the child survived its birth—the absence of putrefaction and of artificial inflation being assumed.

The so-called "*middle ear test*" is not to be relied on.

Stronger evidence of live birth may be afforded by the condition of the *umbilical cord*, the desquamation of the *skin*, or the discovery of *food* in the stomach. The umbilical cord may afford positive proof of live birth, and may, moreover, supply indications of the *time* that has elapsed since birth, owing to the series of changes which take place in its appearance while the child is living. The most trustworthy of these is the ring of inflammatory redness which begins to form about twenty-four hours after birth at the junction of the cord with the abdominal wall, and goes on to suppuration, ending in the separation of the cord by ulceration about the fourth or fifth day.

Spontaneous separation of the cord never occurs in a still-born child. The cord dries up but does not separate or exhibit any of the inflammatory changes just described.

III. THE CAUSE OF DEATH of a newly-born infant is one of the most frequent as well as most important questions the medical jurist has to answer. He must be familiar with the many *natural* and *accidental* causes of death to which the infant is exposed during birth. The following are amongst the most frequent of these:—

1. *Compression of the umbilical cord* before normal respiration is established frequently results in the death of the child if it is not remedied at once. Death is due to the stoppage of the circulation through the cord, and the consequent cutting off of the supply of oxygenated blood, resulting in suffocation. The post-mortem appearances of the organs will be those of suffocation, viz. distension of the heart with venous blood, bloodstained mucus and particles of vernix caseosa in the air-passages, the latter being drawn in with the attempts at respiration provoked by the venous condition of the blood.

2. *Suffocation or strangulation* may occur from the cord getting round the child's neck—a position of the cord which is found in about one in four deliveries. It may leave a groove or mark suspiciously suggestive of

strangulation with a string, but the skin of the neck is not abraded as it most probably would be by a string.

3. In a very *protracted labour* the child may die from exhaustion, or from pressure of the uterus or maternal passages. The child may even exhibit injuries suggestive of violence from the powerful character of the uterine contractions.

4. *Hæmorrhage* from the cord may occasionally be fatal, especially if it has been cut with a sharp instrument and imperfectly ligatured. The face, in this case, will be pallid and waxy looking, and the organs bloodless.

5. *Fractures* of the cranial bones during birth are very rare, but are occasionally caused by the use of instruments, or by some abnormal obstruction to delivery. They are most often found in the parietal bones—never in the occipital—and are mere fissures. When due to *intentional* injury the fracture is generally depressed, and is accompanied with obvious injuries to the scalp. But fractures having these characters may also be caused *accidentally* by the mother being suddenly delivered while in the standing position, and the child's head coming in contact with the hard ground as it falls head downwards.

6. The child may be accidentally *asphyxiated* owing to the mother being suddenly and unexpectedly delivered while on the seat of a water-closet, etc., the child being precipitated head down into the pan, where, if it is allowed to remain, it is quickly drowned or suffocated. This is one of the commonest explanations given by the mother, with the addition that she fainted away before she could place the child in safety. In the vast majority of such cases the story is a pure fabrication, but there is no doubt that such rapid delivery has taken place, and has been followed by immediate unconsciousness. A remarkable instance of this is quoted by Mann (*Forensic Med.*, p. 151), where the child would certainly have been lost but for the timely assistance of a nurse. Moreover, it should not be forgotten that a married woman with no reason to desire to get rid of her child is sometimes so absolutely indifferent to its fate at the time of its birth, that if it depended on her alone the child might die; and yet no one would attribute a criminal motive to such neglect.

7. A child that is immature or badly nourished in utero may die from very slight causes which would not affect an ordinarily robust child.

The most important forms of INFANTICIDE will now be considered. *Asphyxia* in some of its forms—suffocation, immersion in privies, strangulation, or drowning—accounts for by far the largest number, no less than four-fifths of the cases investigated by Tardieu.

Suffocation is the commonest of all. A very slight obstruction to the free access of air may suffice to suffocate a very young child, and leave no mark of violence to distinguish it from accidental suffocation, which may very easily take place when a woman is confined alone. The criminal character of the act is generally made evident by the use of excessive violence. For post-mortem appearances, see *supra*, p. 325.

Strangulation and *throttling* generally leave marks of the ligature or fingers of the murderer on the infant's neck, or the cartilages of the larynx will be found broken, and the deep tissues infiltrated with blood. Accidental strangulation by the umbilical cord may occur as we have seen, and is generally distinguishable.

Drowning may be an accidental cause of death in the way we have seen above. It is not a common mode of committing infanticide; but it is common enough to find a child that has been killed, or has died, thrown into a pond, etc., to get rid of it. If the child has breathed freely and was alive

when immersed, it will show the usual signs of death from drowning (*supra*, p. 325).

Death may be caused by *wounds and injuries*. The existence of these will give rise to the same class of questions, to be answered by the same class of considerations, as in the case of adult bodies. Minute *punctures* penetrating vital organs—the brain, spinal cord, heart—have frequently been found, and should be searched for.

The fact of live birth may require to be proved in connection with a question of INHERITANCE of property. Generally, direct testimony as to the occurrence or non-occurrence of some obvious sign of life after birth is available. Any sign of life however evanescent, the least muscular movement, or pulsation of the heart, or the feeblest cry—provided it was observed after the child's complete expulsion—satisfies the English law. In Scotland, it must be proved to have breathed after birth.

A husband's right to his wife's estate as *tenant by the curtesy of England* (see CURTESY) depends on his having issue by her born alive, and born while the mother was living, and born capable of inheriting, *i.e.* not a "monster." There is no precise definition of a monster, other than Lord Coke's—"a being which hath not the shape of mankind." It is for the jury to say, after hearing the description of the being, whether it is or is not a monster.

It appears that the delivery of a living child by Cæsarean section after the mother's death does not entitle the husband to his tenancy by curtesy, because at the moment of the mother's death the marriage was dissolved and the estate passed to her heir-at-law. Yet the child so born is legitimate, and if it survive, can inherit.

The subject of IMPOTENCE and STERILITY arises in connection with legitimacy, divorce, and criminal assaults. IMPOTENCE is incapacity for sexual intercourse; STERILITY is incapacity for procreation of children. Both sexes may suffer from either incapacity. A man may be sterile either through impotence, or through absence of the impregnating elements in the semen. A woman may be sterile through impotence (absence or malformation of the external organs), or through absence or defective condition of uterus, ovaries, etc.

In the male.—Up to the fifteenth or sixteenth year there is normally no procreative capacity. The old age limit, if it exists, is not known, but men of eighty may be both potent and fertile, though less so than younger men. The various malformations and injuries of the sexual organs may cause incapacity according to their character, *i.e.* sterility if they prevent secretion of normal spermatic fluid, and impotence if they prevent its conveyance to the vagina. Thus non-descent of testicles does not prevent either of these processes; but complete loss of both testicles would interfere with the first process though not with the second; and so a eunuch is sterile but not impotent. It is to be remembered that impregnation may take place from the deposition of semen on the vulva without its projection into the vagina.

In the female.—Puberty is reached normally at fourteen or fifteen years of age, and its arrival is marked by the commencement of *menstruation*. Exceptionally, menstruation occurs much earlier. In fact, mere age is not sufficient to decide the question of sexual capacity in either male or female, and especially in the female. The degree of development of the external organs, and of the changes in voice and appearance are more trustworthy.

The superior age limit is fairly definite in women. The *menopause* usually indicates the end of procreative power, and it occurs pretty constantly at about forty-five years of age, though it may occur several years

earlier or later, often as late as fifty. Children are rarely born after forty-five, but this rule is not invariable. The various deformities and abnormalities known to gynœcologists may be causes of impotence or sterility in the female.

Proof of either impotence or sterility in an alleged father or mother would disprove the allegation of parentage, and the English law would give effect to all the consequences. Impotence but not sterility, on either side, is a ground for a decree of nullity of marriage; but it must be shown that it existed at the time of the marriage, and was not known to the other party, and is incurable.

LEGITIMACY.—A child born in wedlock is presumed to be legitimate, but this presumption may be rebutted by evidence of the impossibility of the husband being the father. Thus it may be proved by medical evidence that the husband is impotent (incapable of intercourse) or sterile (incapable of procreation). Or it may be shown that the husband had not access to his wife during the period which would be consistent with the date of the child's birth. The plea of non-access brings up the question of the normal *duration of pregnancy*, or, rather, of the normal interval from coitus to birth. This is a variable interval, recorded cases showing that labour has come on as early as 260 days after a single coitus, and has been delayed as long as 293 days (Luff, ii. 231). The average is given as 275 days by Matthews Duncan. It is made up of two unknown and variable intervals, namely, the interval between coitus and impregnation of the ovum, and the interval between impregnation and birth. It is not known at what time union of the spermatozoon with the ovum takes place, and therefore the exact date of actual impregnation cannot be fixed. The probable date of labour is usually calculated from the date of the cessation of the last menstrual period. This is the best starting-point, but it is untrustworthy, because impregnation may take place while menstruation is in abeyance temporarily from some other cause, or menstruation may continue after impregnation for one or two periods. Even when these sources of wide error are eliminated, this interval is not constant. Duncan gives the average as 278 days. But it must be remembered that this is simply an average, and that in any particular instance it may vary by several weeks on either side. In France and Italy the law does not admit the possibility of gestation lasting more than 300 days. In Germany it is fixed at 302. In England and America no limit is fixed, and each case has to be determined by the evidence of experts called for the purpose.

Numerous cases have been recorded by medical men of gestation reckoned from the last day of menstruation lasting over 300 days. But, depending as they must upon the statements of the women themselves, they can hardly be accepted as scientific truths.

An *abnormally short*, as well as abnormally long alleged gestation, may throw doubts on the supposed parentage. In such cases the degree of *maturity* reached by the child may be the decisive factor. This can be estimated in the case of a dead body with considerable confidence within a few weeks by reference to well-known developmental signs given in medical treatises. In the living child the signs may not allow of so close an estimate. The earliest period at which a child is *viable*—that is, capable of continued independent existence—may be taken to be 180 days, and very few are, in fact, viable at this early period. In France, Italy, and Germany a husband may repudiate his wife's child born within 180 days of marriage, if he can prove non-intercourse before marriage. In England and America no limit is fixed by law.

RAPE.—The legal aspects of the crime of rape are dealt with in the special article under that title (see RAPE). Here all that we require is a clear understanding of the nature of the crime. RAPE is defined as "*the carnal knowledge of a woman by force and against her will.*"

Below the age of thirteen the consent of the girl makes no difference; intercourse with her under any circumstances is felony in the male. Between the ages of thirteen and sixteen, consent reduces the crime from felony to misdemeanour; and above sixteen, consent makes intercourse non-criminal. It is now settled law that CARNAL KNOWLEDGE is accomplished by mere penetration to any degree, however slight, with or without emission. The mere introduction of the penis within the vulva without vaginal penetration or rupture of the hymen, suffices to constitute the crime. Corroboration of the complainant's story in some material particular is required, and is generally based on the medical testimony as to the appearances of the genital organs of the complainant.

THE DUTY OF THE MEDICAL MAN called to a case of alleged rape is, therefore, to ascertain by careful examination of the complainant's genital organs (with her consent, of course) what their condition is, and to note the presence or absence of indications of intercourse or attempted intercourse with or without violence. He must remember that false accusations are terribly common, and must on no account accept any statements of the complainant or her friends without verifying them by his own observation. He should attend at once when called, so as to minimise, as far as possible, the facilities for fraudulent preparations; note whether the complainant walks easily or as if in pain (an unconscious indication of the severity or otherwise of injuries); and obtain her consent (or that of her friends, if she is very young) to an immediate EXAMINATION. This must be thorough, and in the best light obtainable, the woman lying on her back on a couch or bed, with thighs widely separated so that the hymen can be fully examined. Sometimes the separation of the thighs is so painful that anæsthesia may be necessary. Specimens of the mucus between the folds of the vulva and from the vagina should be removed and examined microscopically for spermatozoa. Any stiffened masses of pubic hair, and any stains of blood or semen on clothes should be cut out and preserved for the same purpose. The existence of any discharge, and its character if possible, should be determined. The thighs, arms, and indeed the whole body, should be examined for bruises or marks of violence.

By far the largest number of rapes are perpetrated on CHILDREN UNDER TWELVE years of age, many of them being much under that age. There are obvious explanations of this, but one of the most pernicious and revolting is the superstitious belief, still largely prevalent, that intercourse with a virgin is a cure for venereal disease. In such very young children there must always be injury to the external organs if penetration has been effected or vigorously attempted; but the hymen is not generally ruptured, as it is too deeply situated in the narrow vaginal passage. If a young child is seen within a day or two of the rape, the vulva will probably be swollen, inflamed, and more or less lacerated. A day or two later the mucous membrane of the vagina will be inflamed, and a scanty yellow discharge oozing from it.

The character of the DISCHARGE may be a question of vital importance. It may be due to simple *vaginitis*, the result of violence, or to *gonorrhœa*, the result of intercourse, or to infantile *leucorrhœa*. The latter, which is not uncommon amongst sickly children, is often mistaken by mothers for one of the former, and believed by them to point to impure intercourse,

perhaps suggesting a charge against an innocent person. It is more copious than that from simple vaginitis, and is not associated with signs of injury. A true gonorrhœal discharge does not appear before the fourth to the eighth day from infection, is more profuse than that of leucorrhœa, and lasts longer. At present bacteriology cannot be relied on for diagnosis. Both gónorrhœa and syphilis may be, and occasionally are, communicated by towels, sponges, etc., which have been used by infected persons. Bruises and injuries to the body are seldom found on very young children, because there is little or no resistance to be overcome. Death may possibly occur from shock or hæmorrhage.

In the case of girls and young women above the age of puberty, and presumably virgins, too much stress must not be laid on the presence or absence of the HYMEN as evidence for or against virginity; and, of course, it is no evidence at all for or against the crime of rape. It is true that the membrane is present in some form in almost every virgin, and is absent, or at least obviously ruptured and partly gone in almost every woman who has had intercourse. But there are plenty of well-established exceptions to both rules. Accident, disease, self-abuse, or operation may account for its absence; and, on the other hand, it has been frequently found intact in prostitutes after years of intercourse, and has been known to survive abortion.

In RAPE OF ADULTS, especially if they were not virgins, there will generally be less injury to the genital organs and more marks of resistance on the body. It is generally considered extremely doubtful if an average man could commit rape on an average woman if she made a determined resistance. But a woman may be disabled more or less by *intoxication* or *drugging*, or by *insensibility* from syncope or coma (*e.g.* post-epileptic), or she may be powerless from *fright* or *exhaustion*, or may be coerced by *threats* or by *hypnotic suggestion*. It is just possible that the crime may be committed *during natural sleep*.

DRUGGING with alcohol or narcotics is probably commoner than is suspected; but it should be remembered that anæsthesia and narcotism cannot be induced instantaneously, as women sometimes allege; and unless a woman was asleep, she could not be anæsthetised without her knowing it, and hardly without her consenting to it, unless overpowered by two or three persons. It is possible to chloroform persons during sleep, but the attempt usually wakes them.

The unfounded CHARGES too frequently made against medical men and dentists of criminally assaulting anæsthetised patients are no doubt in some cases made *bonâ fide*, and the explanation is that partial anæsthesia does in some persons arouse sexual desire, and the delusions which so commonly occur in the early stages of anæsthesia are likely to take an erotic type in such persons, while the restraint of struggling, generally necessary in the same stages, may be mistaken by the patient for an assault. A charge made under such circumstances should not be credited without convincing corroboration, the only satisfactory form of which is that derived from an immediate examination of the person of the complainant. But the risk of having the charge made can only be avoided by making an invariable rule never to give an anæsthetic to a woman without the presence of a third party.

The allegation of the woman that she was HYPNOTISED must be received with great scepticism in the absence of resistance at the moment of perpetration of the crime. As to violation DURING SLEEP, it is undoubtedly possible to commit rape as the law defines it, because mere introduction of

the penis within the vulva is not necessarily painful. It is said that full penetration with emission may fail to awaken a woman accustomed to intercourse, but in a virgin this would certainly be impossible.

PREGNANCY, it was once believed, could not follow rape. This is now known to be not true.

SEMINAL STAINS.—Spermatozoa may be obtained from stains on clothing, etc., by moistening the fabric in water and dabbing it gently on a microscope slide, or the spermatozoa may be stained and dried. They have been obtained and recognised from stains several years old.

UNNATURAL SEXUAL OFFENCES.—There are no constant characteristic indications of such acts, and medical evidence cannot help much in establishing or refuting charges relating to them.

COLOURED STAINS.

BLOOD-STAINS.—To determine whether a stain on the clothes of an accused person, or on a weapon found in his possession, is or is not blood, may be of the utmost importance as a link in the evidence. The expert has generally to answer the question under difficult circumstances, owing to the age of the stain, or the minuteness of the quantity of the staining matter.

A RECENT blood-stain is bright red, but in a variable time (from a few hours to several days) it changes to reddish brown, the change occurring quickest in the impure air of manufacturing towns. After a week or so it is impossible to tell the age of a blood-stain.

Modern science has supplied us with three separate methods of examining blood-stains—by the *microscope*, by the *spectroscope*, and by *chemical* tests.

The bloodstained fabric, if examined while fresh with a LENS, will be found to have minute clots of coagulated blood entangled in its fibres. If the stain is not recent, the fabric will simply look as if it had been dyed. For MICROSCOPIC examination of a recent stain, cut out a small piece of the stained fabric and place it in a test-tube with a few drops of cold distilled water, or glycerine and water (1 in 10). The colouring matter will be dissolved; and if a drop of the solution be squeezed out of the fabric on to the slide of a microscope, red corpuscles will be seen more or less disintegrated.

If the fabric cannot be cut, it may be scraped, and the scrapings treated as above.

The distinction of HUMAN blood from that of other mammals (except the camel) is practically impossible. But the oval shape and nucleus of birds', fishes', and reptiles' blood corpuscles enable human blood to be distinguished from theirs.

The microscopic method is not available if the stain is old. The SPECTROSCOPIC method is best in that case, as it has given trustworthy results after forty or fifty, or even perhaps a hundred, years. To apply it, a solution of the staining matter is prepared by soaking the stained material in a saturated solution of borax in cold water, to which a few drops of liquor ammonia may be added. The solution, after filtration, is placed in a small test-tube, or Sorby's cell, and examined with the spectroscope or microspectroscope. If there is hæmoglobin or its derivatives in solution, the spectra are so characteristic that the presence of blood may be considered conclusively established. No other known substance gives the spectroscopic reactions of oxyhæmoglobin, reduced hæmoglobin, and reduced hæmatin.

For details of this method of examination, see Dixon Mann, p. 66, or Luff, vol. ii. p. 9.

CHEMICAL tests.—1. The *guaiacum test* consists in adding to a watery solution of the stain a few drops of tincture of guaiacum, and then a drop or two of ozonic ether. If blood is present, a blue-green colour is developed. This test is not conclusive of the presence of blood, as a few other substances may give the same colour reaction.

2. The best of all chemical tests is that for producing hæmin crystals. For details the reader is referred to works on physiology, or to Dixon Mann's *Forensic Medicine*, p. 70.

It is well to remember that a solution of blood is coagulated by boiling, and the red colour is changed to a muddy brown. A very thin film of blood on a knife-blade looks yellow, not red. The stain on a knife-blade produced by the juice of apples, oranges, etc., has been mistaken for blood.

INSANITY.

The subject of INSANITY comes under the consideration of the medical jurist chiefly in relation to *civil capacity*, *criminal responsibility*, and the *certification of lunatics* for purposes of restraint.

The law applicable to these matters is dealt with in previous articles (see art. LUNACY for civil capacity and criminal responsibility, and art. ASYLUMS for certification).

For the medical jurist the subject includes the whole range of pathological phenomena associated with mental and moral derangement considered as a disease.

He must be prepared to find his views sometimes in sharp CONFLICT WITH THE RULES OF LAW. Nor is this conflict to be wondered at when it is remembered that the lawyer, as Sir James Stephen reminds us, is thinking of conduct of a certain character, while the physician is thinking of a diseased condition which forms an essential factor in the production of such conduct. Doctors think that the lawyer falls into the error of testing responsibility by a false standard—one derived from observation only of the sane, and taking little account of the complex and subtle phenomena of mental disease which only an expert can be familiar with.

The lawyer, on the other hand, sees the danger to the community of interfering with the deterrent effects of legal penalties if he grants the doctor's claim of irresponsibility for the person whose self-control is defective.

The TESTS of irresponsibility on the ground of insanity adopted by the English Courts are set forth in the article LUNACY (p. 51).

These tests have never been acquiesced in by the medical profession, and have been boldly attacked over and over again by leading psychopathists, who contend that there is no fixed standard of sanity, and therefore there should not be a fixed test of responsibility by which every case is to be decided, inasmuch as there are infinite varieties in the forms and degrees of mental derangement, and the question of responsibility depends upon an impartial weighing of every one of the factors in each case. They say, also, that mere knowledge of the nature and quality of an act, and that it is a wrong act, is not of itself sufficient to establish the moral (and as a consequence the legal) responsibility of the actor; because he may be absolutely powerless, through disordered feeling, to refrain from an act which he absolutely condemns and fully understands. In other words, the element of self-control comes in as well as the element of understanding, and self-control may be overpowered by *disordered feeling* over which reason has no

influence. The right question for consideration, as Dr. Maudsley puts it (*Brit. Med. Journ.* Sept. 28, 1895, p. 771), is "the disabling effect of the particular mental disorder in the particular circumstances,—a question to be decided by full, impartial, and competent consideration of all the facts of the case; by a consideration, that is, fitly instructed to appreciate their nature and bearing; not, as now, by incompetent consideration expressly misinstructed" . . . (alluding to the present procedure, under which "the Court makes no provision to obtain impartial scientific evidence, but requires or allows the parties in the case to ransack the medical highways and by-ways in order to obtain contradictory evidence with which to confound a jury ignorant of its meaning"). "On the other hand, medical men should discard the notion of insanity in the abstract, and leave off talking of it as if it were something definite and constant, which annulled all responsibility. To place before the Court as plainly as possible all the facts of the particular form of mental derangement in the case; to explain what they mean according to the best scientific information, and how far they affect the mind, and leave the Court to judge—that is the proper medical function."

ILLUSIONS, HALLUCINATIONS, AND DELUSIONS.—An *illusion* is a false perception of an external impulse: an erroneous sensory image arising out of an actual sensory impression.

A *hallucination* is a perception without an external impulse: a sensory image in the absence of a sensory impression. It is entirely subjective, and is independent of things external, whereas an illusion depends on external things which are capable of affecting the senses. Thus if a person hears voices when all around is silence, it would be a hallucination; but if the barking of a dog sounds to him as articulate human speech, it would be an illusion. We speak of an illusion of the senses: a hallucination of the mind. There may be auditory, gustatory, olfactory, visual, or tactual illusions and hallucinations.

An illusion or hallucination may possess a perfectly sane person so long as the reasoning power is not brought to bear upon it and examine it. If it is adopted by the reasoning power and accepted as a reality, it becomes a *delusion*, and may indicate a disordered mind. Delusions are not all founded on illusions and hallucinations—any faulty belief, out of which the subject cannot be reasoned by adequate methods for the time being, may be called a delusion, but not necessarily an insane delusion. The history of religion and science supplies innumerable instances of delusions of this sort on abstract questions. The illusions of the insane are almost always about something personal to themselves.

A LUCID INTERVAL is the legal term for a temporary intermission or cessation of mental derangement (see art. LUNACY, *sup.* p. 47). In most cases of intermission between recurrent attacks the patient is not entirely free from a tinge of insanity, which, however, may not be such as to interfere with his capacity for managing his affairs, or his responsibility for crimes. A lucid interval may begin or end very abruptly, and may last any time from a few minutes up to years, and may recur many times. The recurrent attack commences in a sudden outbreak of excitement, during which acts of violence may be committed.

FORMS OF INSANITY.—The most important types of mental derangement will now be briefly noticed. The term MANIA includes acute delirious mania, ordinary acute mania, and chronic mania. In all of these there is marked absence of self-control, with more or less excitement. In *acute delirious mania* or maniacal delirium the outbreak is generally sudden, with few premonitory symptoms, but sometimes there is a stage of depression,

followed by unusual loquacity. Young adults are most subject to it, especially those with neurotic tendencies. The exciting cause is often mental shock or acute disease. But it is not to be confounded with the delirium which is so common an incident of fevers, nor with *delirium tremens*, the result of alcoholism. When at its height there is violent excitement, great restlessness, a disposition to attack attendants, to destroy clothing, to ignore considerations of decency, to shout and swear and talk incoherently. There is considerable constitutional disturbance.

Ordinary acute mania is a more purely mental derangement. It occurs most frequently in mature adults, sometimes beginning quite suddenly, but more often being foreshadowed by extreme exaltation or extreme depression. The early symptoms are a confused feeling in the head, restlessness, irritability, disturbed sleep, dread of something going to happen, occasionally an impulse to commit acts of violence.

Later on the manner changes; the patient is boisterous—laughing, scolding, swearing. Hallucinations and delusions arise. He begins to shun his friends, and develops mischievous propensities. His behaviour becomes more and more outrageous, his movements more incessant, his conversation more incoherent. Persons suffering from either form of acute mania exhibit an astonishing power of endurance, keeping up continuous exertions for days and nights without any sleep, and often without food. They may recover, or they may pass into chronic mania and dementia, or into melancholia.

The mark of MELANCHOLIA is self-consciousness, associated with depression altogether out of proportion to the apparent cause. It is frequently accompanied by delusions. It begins very gradually with lowness of spirits, lack of interest in the occupations and amusements of daily life. The patient can argue rationally on most subjects not connected with his special delusion. Melancholia may pass off either gradually or suddenly; or it may merge into dementia, or may last till death. Suicidal tendencies are extremely common, the sufferer wishing to escape from a life which he views so gloomily. Homicidal tendencies are not frequent.

The characteristic of DEMENTIA is general enfeeblement and decay of the mental powers. There is a lack of ideas—whereas in mania there is exuberance of ideas. The countenance expresses absence of intelligence and complete apathy—not intense misery, as in melancholia. The bodily condition is one of great languor.

DELUSIONAL INSANITY is sometimes called *monomania*, and by lawyers *partial insanity*. It is characterised by a fixed delusion of a limited kind, while on other subjects there is little or no trace of derangement.

Hallucinations of hearing are common in this form of insanity: the patient hears voices bidding him do certain things; or he smells strange odours in connection with food and drink—hence arise suspicions that he is being poisoned.

The nature of the delusion determines the conduct of the sufferer. He will generally speak and act consistently with his delusion. If it takes the form of suspecting a person of having a design to injure him, he may resort to violence in self-defence or revenge. Women influenced by erotic delusions may make unfounded charges of improper conduct.

MORAL INSANITY.—In most of the forms of insanity already considered, alteration of the character and disposition is followed before long by obvious derangement of the intellect, and generally of bodily health as well. But there are cases in which neither physical nor mental capacity appears to be affected, and yet the moral sense is perverted to such a degree that by

common consent the person is held to be insane. Whether such a perversion should be called moral insanity or moral depravity must be dubious in most cases, as the one passes insensibly into the other without any dividing line, and the difference appears to be only one of degree. This is one of the grounds on which the legal and medical tests of responsibility come into conflict (see *supra*, p. 340).

Moral insanity may be congenital—such cases contributing largely to the criminal classes—or it may be connected with epilepsy or general paralysis.

IMPULSIVE INSANITY is the name given to a morbid condition of the mind in which strong or ungovernable impulse to do some irrational act is developed, without delusion or loss of general self-control. It is not the same thing as a sudden outburst of passion, which partakes more of the nature of temporary mania culminating in an explosive act, the result of general loss of self-control. The subject of "impulsive insanity" may consciously resist the impulse and keep it in check for an indefinite time. He may eventually conquer it, or it may at last conquer him, and he obeys its dictates with a perfectly clear vision of the consequences.

[*Authorities.*—Taylor, *Principles and Practice of Medical Jurisprudence*, 4th ed. (1894), edited by Thomas Stevenson, M.D.; *Forensic Medicine and Toxicology*, by J. Dixon Mann, M.D., F.R.C.P. (1893); *Text-book of Forensic Medicine and Toxicology*, by Arthur P. Luff, M.D., B.Sc. Lond. (1895). There are many other excellent English text-books on these subjects, and a few valuable monographs. The reader will find a great store of illustrative matter, chiefly by American contributors, in Hamilton and Godkin's *System of Legal Medicine* (1895). Brouardel's *La Mort et La Mort Subite* (translation by Benham, 1897) is most suggestive. It is hardly necessary to say that German and French observers, owing to their greater facilities for experimenting, have supplied our English writers with a large proportion of their most valuable material.]

Medical Officer of Health.—The present position of these officers is the result of progressive legislation, which, beginning in a small and experimental way, has now established them as State functionaries, with powers of supervising the affairs of private individuals far larger than are generally supposed. To trace the progress of the legislation by which they have attained to their present legal position is interesting.

By the original Public Health Act of 1848, 11 & 12 Vict. c. 63, s. 40, boards of health, whose jurisdiction was only over populous districts not under the government of municipal corporations, were empowered to appoint a medical officer of health. It rested absolutely in their discretion whether they would appoint such an officer or not; the salary was paid entirely by them; and he was removable by them: but the appointment and removal were subject to the approval of the General Board of Health. Similar powers had been given by the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, s. 12, for districts where that Act was incorporated. The Metropolis Local Management Act, 1859, 18 & 19 Vict. c. 120, s. 132, imposed on the vestries and district boards, who are the sanitary authorities for their respective districts, the *duty* of appointing medical officers of health to inspect and report periodically upon the sanitary condition of their parish or district, who were to point out the existence of any nuisance or other local cause likely to injuriously affect health, point out the most efficacious

mode of preventing the spread of epidemics, and perform any other duties of a like nature which might be required. The salary was paid by the vestry or board, and its amount was left to their discretion; and the officers appointed were removable at their pleasure. The next advance was in the Artisans and Labourers Dwellings Act, 1868, 31 & 32 Vict. c. 130, which applied to places having a population of 10,000 persons or more. In such places which had no medical officer of health, it was enacted (s. 4) that "the local authority, with the approval of a Secretary of State, *shall* forthwith appoint such officer for such period as shall be necessary, shall assign him his duties, and pay him such salary as they with such approval shall think fit." They might also with the like approval from time to time remove any officer so appointed, and appoint another in his place. Since the year 1868 the appointment of medical officers for all populous districts has been obligatory.

The health of rural districts was left alone by Parliament till the year 1860. The Nuisances Removal Act of that year gave power to guardians and overseers to put in force the Diseases Prevention Act where necessary; and further empowered guardians at any time to employ one of their medical officers to make inquiry and report upon the sanitary state of their union or parish, and to pay him a reasonable compensation for such work (23 & 24 Vict. c. 77, s. 14). This power was clearly only intended to be used in a few districts, and appointments under it were of a temporary character.

The Local Government Act, 1872, 35 & 36 Vict. c. 79, s. 10, completely altered the previously existing state of things, by imposing on all sanitary authorities, urban and rural, the duty of appointing properly qualified medical officers of health. The Local Government Board, who by this date had been constituted the controlling authority, were declared to have the power of regulating the appointment, duties, salary, and tenure of office of these officers; who thus were made in some measure independent of the local authorities of the districts for which they were appointed.

The Acts previously in force outside the metropolis were repealed and consolidated in the year 1875 by the Public Health Act, 38 & 39 Vict. c. 55. By secs. 189 and 190 urban and rural sanitary authorities are required to appoint medical officers of health for their respective districts, who have also the powers of an inspector of nuisances. The same person may, with the sanction of the Local Government Board, be appointed for two or more districts jointly (s. 191). He must be a legally qualified medical practitioner (see MEDICINE). In populous districts further qualifications are now required (*vide infra*). The salary might apparently, under the words of the Act, have been paid wholly by the sanitary authority, if they chose. It was, in fact, paid partly out of moneys voted by Parliament, which the sanitary authorities were only too glad to get in relief of their rates. Half these salaries is now payable, under sec. 24 of the Local Government Act, 1888, by the County Council, to whom Parliament gives the funds for making these, among other, payments.

The Local Government Board is empowered to define the duties of medical officers of health, to direct the mode of their appointment, determine their continuance in office or dismissal, and the amount of their salaries (*ibid.*). They have accordingly at different times issued general orders dealing with these matters. The orders now in force were issued on March 23, 1891, and are printed in Vesey FitzGerald's and Lumley's books on the Public Health Acts. The duties are prescribed in these orders with considerable detail. They may be summarised by saying that the medical

officer is required to advise the sanitary authority on all sanitary questions which may come before them; to receive reports of infectious disease (see vol. vi. p. 424), and take the necessary precautions for isolation, and for preventing the spread of infection; to take measures for dealing with any epidemic which may break out in his district; to superintend the inspector of nuisances (see NUISANCE); and where informed of the existence of a nuisance injurious to health, to take such steps as he is legally authorised to take; and, as the circumstances of the case may require, to inspect and examine articles of food intended for sale and suspected of being unsound; and if he finds them to be so, to give directions for having them judicially condemned; to take samples under the Sale of Food and Drugs Act and the Margarine Act; to inquire into the management of any offensive process of trade carried on within the district, and report on the appropriate means for preventing injury to health therefrom; to report his proceedings to the local authority, the county council, and the Local Government Board; and generally to observe any instructions issued by that Board and the directions of the authority which appoints him. The appointment is for a definite period, or till the officer die or resign, or is removed by the sanitary authority with the sanction of the Local Government Board, or by that Board. The salary must be approved by the Board, and is payable up to the day when the officer ceases to hold office. The authority may also, with their approval, make extra payments on account of extraordinary services, or other unforeseen or special circumstances connected with the duties.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 17), county councils may also appoint medical officers of health of their own. Such officers may not, without the express written consent of the county council, engage in private practice, or hold any other appointment. But arrangements may be made for rendering the services of county medical officers available in the district of a district council, with all the powers of their medical officer. While such an arrangement is in force the duty of the district council to appoint a medical officer is deemed to be satisfied without the appointment of a separate medical officer. Most county councils, it is believed, have availed themselves of their power to appoint medical officers. In many cases such officers also act for district councils. The arrangement is usually a satisfactory one, as the officer is thereby removed from private practice, and rendered able to act independently. A practitioner who, in discharge of his public duties, may offend influential private patients, is always liable to the suspicion—however honourable his character may be—of subordinating his official conduct to his private interests. It is most important to avoid, as far as possible, all occasion for such suspicions.

County medical officers, and those appointed since Jan. 1, 1892, for districts containing a population of 50,000 inhabitants or more, must not only be legally qualified for the practice of medicine, surgery, and midwifery, but also be registered as holding a diploma in sanitary science, public health, or State medicine (see MEDICINE).

Medical Relief.—See POOR LAW.

Medical Witness.—See EVIDENCE; MEDICAL JURISPRUDENCE; MEDICINE.

Medicine; Medical Practitioner.

TABLE OF CONTENTS.

Introduction	346	Fees of Witnesses	350
Physicians; Surgeons	346	Women	351
Apothecaries	347	Dentists	351
Medical Acts	348	Liability for Negligence	351
Medical Council	348	Criminal Responsibility	352
Qualification for Registration	349	Pharmacopœia	352
Privileges of Registered Persons	350	Notification of Disease	352

Introduction.—The practice of the healing art has long obtained legal sanction and recognition in this country. Practitioners were divided into three main branches, known respectively as physicians, surgeons or barber chirurgeons, and apothecaries, whose functions and status were quite distinct, who were governed by different charters and statutes, and pursued their callings independently of, and sometimes in antagonism to, one another. Besides the above, there have always been, as there are still, persons who attended to human ailments without having any legally recognised qualification for doing so. The union of all qualified persons, and their recognition as members of one profession, is modern.

Physicians.—By a statute passed in the year 1511 (3 Hen. VIII. c. 11), no person was permitted to take upon him to exercise and occupy as a physician and surgeon until he had been examined and approved for that calling. The examination was in those days conducted under the sanction of, and the approval obtained from, the bishop of the diocese.

Physicians obtained a charter of incorporation in the year 1518, and in 1522 the college got the right of examining and approving persons to practise physick, concurrently with graduates of the universities of Oxford and Cambridge. The bishop's licence was thus superseded (14 & 15 Hen. VIII. c. 5). The college were also empowered to exercise control and supervision over all dealers in drugs. By a subsequent Act of the same reign (32 Hen. VIII. c. 40), persons chosen and admitted by the President and Fellowship of the College of Physicians were authorised to practise in physick, including surgery, anywhere within the realm. The charter and Act of 1522 were recognised and confirmed in 1553, and the privileges of the college enlarged (1 M. Sess. 2, c. 9). Their charter and privileges were again recognised by statute in 1858, 1859, 1860, and 1886. The material portions of these Acts are discussed in subsequent parts of this article.

Surgeons.—Surgery was originally practised by barbers. In the city of London the barbers obtained a charter of incorporation from King Edward IV. in the year 1461. Many other skilled surgeons were, however, in practice, and in the year 1540 they and the barbers were incorporated, and were given the exclusive right to practise surgery within the city of London and its suburbs (32 Hen. VIII. c. 42). Under the title of "the mystery and commonalty of barbers and surgeons of London," the physicians and barber surgeons seem to have attempted to monopolise all treatment of disease to their own profit, for in the year 1452 (34 & 35 Hen. VIII. c. 9) an Act was passed declaring that it shall be lawful for any subject of the king "having knowledge and experience of the nature of herbs, roots, and waters, or the operation of the same," to practise, use, and minister in and to any *outward* disorder, any herbs, ointments, bettes, pultess, and cornplaisters, according to their cunning, or drinks for the stone, strangury, or agues, without suit, vexation, trouble, penalty, or loss of their goods." The company obtained a further charter in the year 1629 (5 Car. I.), giving it the

right to examine and approve all persons who wished to practise surgery in London and Westminster, and empowering persons so approved to practise anywhere in England. In the year 1745, by statute 18 Geo. II. c. 15, the barbers and surgeons were separated into two companies. All the above liberties and privileges were transferred to the new Company of the Art and Science of Surgeons of London, who were empowered to make by-laws, etc., for their own regulation, ordinance, and government, and to examine candidates and authorise those who passed successfully to practise the art and science of surgery throughout His Majesty's dominions.

It has been suggested that the above Acts, or, at anyrate, the older ones, are obsolete. The Court of Appeal, however, in 1885, did not adopt the suggestion, though it did not expressly overrule it (*Davies* v. *Makuna*, 1885, 29 Ch. D. 596). There have since that time been several general Statute Law Revision Acts; but the above Acts, though amended in some minor points, remain on the list of statutes in force in the United Kingdom.

APOTHECARIES (see also APOTHECARY).—In the year 1618 King James the First granted a charter of incorporation to the apothecaries of London, by virtue of which they practised their art and mysteries and enjoyed special rights and privileges for a period of two centuries. The charter was superseded in the year 1815 by the Apothecaries Act (55 Geo. III. c. 194). By it the master wardens and society of apothecaries were empowered to regulate the conduct of members of their craft throughout England and Wales. No person, not already in practice, might for the future practise as an apothecary, or apothecary's assistant, without passing an examination as to his fitness, and obtaining a certificate of his qualification (ss. 14–17). Any person who should thereafter act or practise as an apothecary without having obtained such certificate was declared guilty of an offence, and liable to a penalty (s. 20); and it was further provided that no apothecary shall be allowed to recover any charges in a Court of law, unless he should prove at the trial that he had obtained the certificate (s. 21). The Act gives no definition of what constitutes practising as an apothecary, beyond reciting (s. 5) that "it is the duty of every person using or exercising the art and mystery of an apothecary to prepare . . . and dispense such medicines as may be directed by a physician." Making up medicines prescribed by a physician, or by any other person, including the apothecary himself, would therefore come within the Act, but surgical attendance would not (*Woodward* v. *Bell*, 1834, 6 Car. & P. 577). "Dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser must be considered as acting as an apothecary" (per Cotton, L.J., in *Davies* v. *Makuna*, 1885, 29 Ch. D. 606). Carrying on business by means of qualified assistants seems not to be prohibited (*ibid.*; see also *Pharmaceutical Society* v. *London and Provincial Supply Association*, 1880, 5 App. Cas. 857). But a qualified man cannot legally recover charges for medical aid and advice rendered by an unqualified assistant, unless under his own express direction and supervision (*Howarth* v. *Brearley*, 1887, 19 Q. B. D. 303).

Apothecaries are distinct from chemists in that they may apply and administer medicines, while chemists may only prepare, dispense, and sell them (*Apothecaries Co.* v. *Greenough*, 1841, 1 Q. B. 800). Pharmaceutical chemists are not considered to be medical practitioners, but are subject to the special regulations of the Pharmacy Acts (see CHEMIST). If a chemist prescribes medicine to his customers, as well as makes it up and sells it, he renders himself liable to the penalty under the Pharmacy Act (*Apothecaries Co.* v. *Nottingham*, 1876, 34 L. T. 76).

MEDICAL ACTS.—The union of the different branches of the medical profession under one governing body was effected in the year 1858 by the Medical Act 21 & 22 Vict. c. 90. The original Act was amended in 1859 (22 Vict. c. 21), 1860 (23 & 24 Vict. c. 7), 1876 (39 & 40 Vict. c. 40, and c. 41), and in 1886 (49 & 50 Vict. c. 48). These Acts are to be read together, and are known as the Medical Acts. By their operation, and especially by that of the Act of 1886, the scope of the original Act has been considerably enlarged.

The constitution of the General Council has been remodelled. It now consists of thirty members, five of whom are appointed by the Crown, twenty are chosen by universities and medical colleges, and five are elected by the registered medical practitioners in England, Scotland, and Ireland (Act of 1886, s. 7).

Medical Council.—By sec. 3 of the Act of 1858 the "General Council of Medical Education and Registration of the United Kingdom" was established. They were directed to appoint registrars (s. 10), who were to keep a correct register of persons legally qualified to practise medicine (s. 15). The register, showing the qualifications of the persons in it, is to be published annually; and the absence from it of any name of any person is *primâ facie* proof that he is not registered (s. 27). The qualifying degrees are set out and enumerated in sec. 18 and Sched. A, as amended by subsequent Acts; and the General Council were empowered, in case it should appear to them that the course of study and examinations to be gone through in order to obtain a qualification from any of the bodies named was not such as to secure the possession by persons obtaining such qualification of the requisite knowledge and skill for the efficient practice of their profession, to represent the same to the Privy Council (s. 20), who may thereupon order that any qualification granted to such body shall not confer the right to be registered (s. 21; Act of 1886, s. 4). No examining body may, however, impose upon a candidate offering himself for examination an obligation to adopt or refrain from adopting the practice of any particular theory of medicine or surgery (*e.g.* homœopathy) as a test or condition of admitting him to examination or granting him a certificate. A body who do so may lose their power of conferring any right to be registered (s. 23). If any registered practitioner is convicted of a crime, or adjudged by the General Council to have been guilty of infamous conduct in any professional respect, the Council may order his name to be erased from the register (s. 28). They are the sole judges of all questions of fact in such inquiries, and there is no appeal from their decision (*Allbutt* v. *General Council*, 1889, 23 Q. B. D. 400). But they must inquire into the case and decide it themselves, after giving the person implicated an opportunity of being heard on the point. The mere withdrawal of a diploma by the body which originally granted it is not of itself a sufficient ground for removing a name from the register (*Ex parte Partridge*, 1887, 19 Q. B. D. 467). If it is shown that a medical man, in the pursuit of his profession, has done something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the Council to find him guilty of "infamous conduct in a professional respect." They must, of course, have evidence on which to support their finding (*Allinson* v. *General Council*, [1894] 1 Q. B. 750). The issue of advertisements with a view to induce the public to consult the advertiser in preference to other practitioners comes within this definition (*ibid.*). The Council in the exercise of their functions under this section are a quasi-judicial body. If, therefore, any of the members who take part in the decision of a case have so acted as to

disqualify them from acting judicially, *e.g.* by sitting on a case in which they have shown a bias or have a pecuniary interest, the proceedings might be set aside (*Leeson* v. *General Council*, 1889, 43 Ch. D. 366; *Allinson* v. *General Council*, *supra*). On the other hand, they cannot be sued for an erroneous exercise of their discretion, as for striking a man off the register when they are not really empowered to do so (*Partridge* v. *General Council*, 1890, 25 Q. B. D. 90). The Privy Council have now a general power of supervision over the Medical Council. If at any time it appears to them that the Medical Council has failed to exercise any power or to perform any duty vested in or imposed on it by the Acts, they may notify their opinion to it; and if the Medical Council fail to comply with any direction of the Privy Council relating to such notification, the Privy Council may themselves give effect to their directions, and exercise any power or do any act vested in or authorised to be done by the Medical Council, and may of their own motion do any act or thing which by the Medical Acts they are authorised to do on a representation from the Medical Council (Act of 1886, s. 19).

Qualification for Registration.—Prior to 1887 the various constituents of the Medical Council each granted their own diplomas, entitling their holders to practise in some one or more departments of medicine, *e.g.* as apothecaries or surgeons. More than one diploma was requisite for a man who was desirous of practising generally. Since June 1887 no person may be registered unless he has passed a qualifying examination sufficient to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery (Act of 1886, ss. 2 and 3).

A registered practitioner is entitled to practise medicine, surgery, and midwifery in the United Kingdom, and (subject to any local law) in any part of Her Majesty's dominions, and to recover in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled (except *fellows* of a college of physicians who, by its by-laws, may be prohibited from suing for their fees (s. 6)). Previously to this latter Act practitioners could be, and frequently were, registered in respect of one or more qualifications only, *e.g.* apothecary or surgeon, and were not legally qualified to practise generally. The position of such persons remains unaltered. They are entitled to practise, in pursuance of the qualification they originally possessed, in medicine, surgery, or midwifery, or any of them, according as they were previously entitled to practise the same, but not further or otherwise (s. 24). Under sec. 31 of the Act of 1858, which is now repealed, it was decided that a practitioner who only held a partial qualification could not recover for services by him in a capacity for which he held no legal qualification. A surgeon consequently could not recover charges for medicines supplied, unless they were ancillary to surgical treatment (*Leman* v. *Fletcher*, 1873, L. R. 8 Q. B. 319). In order to maintain an action the plaintiff must show that he was duly registered at the time when the services were rendered (Act of 1858, s. 22; *Leman* v. *Houseley*, 1874, L. R. 10 Q. B. 66; *Howarth* v. *Brearley*, 1887, 19 Q. B. D. 306).

Persons already on the register for one qualification may, however, subsequently have a higher degree, or additional qualification, inserted there in addition to or in substitution for the qualification previously registered (Act of 1858, s. 30).

Medical diplomas granted in a British possession or foreign country may also be registered, if they are recognised for the time being by the General Council as furnishing a sufficient guarantee of the possession of

the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery (Act of 1886, ss. 11–17). Possessors of diplomas for proficiency in sanitary science, public health, or State medicine, granted after special examination, which appear to deserve recognition, may have such diplomas entered in the register (*ibid.* s. 21). They derive therefrom no additional qualification for ordinary practice; but the diplomas are important with a view to obtaining certain appointments, such, for instance, as that of MEDICAL OFFICER OF HEALTH (*q.v.*).

Obtaining or attempting to obtain registration by false pretences is a misdemeanour punishable with twelve months' imprisonment (s. 39).

Privileges of Registered Persons.—Only persons registered under the Acts are entitled to call themselves legally qualified medical practitioners (Act of 1858, s. 34). They only are eligible for various appointments (*ibid.* ss. 33–36), and they only can give valid certificates in cases where certificates of a medical practitioner are required (*e.g.* for burial, etc.) (s. 37).

Following similar provisions in the earlier Acts with respect to members of different branches of the medical profession, the Act of 1858, s. 35, exempts persons duly registered from serving on all juries and inquests whatsoever, and from serving all corporate, parochial, ward, hundred, and township offices, and from serving in the militia.

The position of a registered practitioner, besides the privileges already alluded to, is further protected by penal consequences on those who without due authority assume the title. It is, as already stated, a misdemeanour to attempt to obtain registration without being qualified. Any person, moreover, "who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary," is liable to a penalty of £20, which may be recovered summarily before magistrates (Act of 1858, s. 40).

FEES OF WITNESSES.—In one respect, at anyrate, the claim of medical practitioners to remuneration for their services stands at present on an unsatisfactory footing. They are often required to give evidence in Courts of justice, and complaints are frequent of the inadequate recompense received for loss of time, and for out-of-pocket expenses besides. The scale of remuneration allowed varies in different Courts, but never errs on the side of liberality; and what may in theory be allowed is frequently reduced by taxing officers, who are practically irresponsible, inasmuch as there is no effective means of appealing from their decisions. The only cases in which adequate remuneration can be secured are those rare ones in which the witness can make a bargain beforehand as to what his fees are to be; and even then it is sometimes found that supposed bargains cannot be enforced. The hardest cases are those in which evidence has to be given in criminal Courts, where the witness may have to attend *de die in diem* for a fee not exceeding one guinea per day, without any allowance for the expense of providing a substitute to attend to his practice during his absence on public duty. Power to fix the scale of fees allowable in criminal Courts was given to the Home Secretary in 1851 (14 & 15 Vict. c. 55, s. 5), and under it the scale now in force was issued in February 1858. At present it certainly requires revision. In Scotland a more liberal scale prevails. Fees for giving evidence before coroners are fixed on a

rather more liberal scale by the Coroners Act of 1887. See CORONER, vol. iii. p. 433; and MEDICAL JURISPRUDENCE.

WOMEN.—In former times women were considered ineligible for the medical, as for other learned professions. A movement, however, in favour of their admission gained considerable force early in the latter half of the present century. The Colleges of Physicians and Surgeons, and most of the other bodies able to confer medical degrees, were averse to the admission of women to practise, but the Society of Apothecaries were willing to confer the right, so far as they could legally do so. Whether they could, was considered doubtful. The doubt was, however, resolved, as far as they were concerned, in the year 1874 by the Apothecaries Act (37 & 38 Vict. c. 34, s. 5), which declares that "nothing in this Act shall deprive the society of such right as they now have, or relieve from any existing obligation, to admit women to the examinations required for certificates to practise as apothecaries," or to enter on their list of licentiates women who shall have satisfactorily passed such examinations. Similar powers to examine and admit women to practise were given in the following year to the College of Surgeons of England (38 & 39 Vict. c. 43, s. 2). And in 1876 it was enacted that the powers of every body entitled to grant qualifications for registration should extend to granting such qualifications "to all persons without distinction of sex" (39 & 40 Vict. c. 41, s. 1). The exercise of the powers so given was not, however, made compulsory, and women were not given any right to take part in the government, management, or proceedings of the universities or corporations mentioned in the Medical Act, 1858. The Act of 1886 made no further alteration in this respect.

DENTISTS.—Dentists were not legally recognised as a separate profession till the year 1878, but at best were licensed by the College of Surgeons, though many of them had no degree at all. By an Act of that year (41 & 42 Vict. c. 33) the Medical Council were intrusted with the duty of keeping a register of persons entitled to practise as dentists, and have with respect to it powers similar to those they have under the Medical Acts with respect to the medical register. This Act was in some respects altered and amended by the Medical Act 1886. The status of DENTISTS is dealt with in a separate article (*q.v.*).

LIABILITY FOR NEGLIGENCE.—From the fact of medical attendance on a patient a contract of employment is presumed, and the practitioner—like other parties to a contract—may be liable for breach of it. From publicly professing any art there is an implied warranty that the person so professing is of skill reasonably competent for the task he undertakes (*Harmer* v. *Cornelius*, 1858, 5 C. B. N. S. 236). On this principle a medical practitioner is responsible in damages to his patient for gross negligence and want of skill in his treatment of him (*Seare* v. *Prentice*, 1807, 8 East, 352). But such negligence is often difficult to prove; and actions alleging it against medical practitioners are rarely successful. The mere fact that the treatment has not resulted in a cure is no proof of negligence; and the opinion of experts that it was unskilful is generally answered by that of other experts who testify favourably to the course pursued. If the person who attends the patient should be unqualified, he is, like the qualified man, liable for his conduct, and equally bound to bring competent skill to the performance of the duty which he has undertaken, and liable to an action for negligence if he fails to do so (*Ruddoch* v. *Lowe*, 1865, 4 F. & F. 519; *Jones* v. *Fay*, 1865, 4 F. & F. 525). The only difference between his case and that of the qualified man consists in this, that a Court or jury is much more likely to find that the treatment of which complaint is made

was unskilful, and the plaintiff can therefore bring his action with a better chance of success.

CRIMINAL RESPONSIBILITY.—From the nature of the cases to which their skill is directed, the medical profession are exposed to a special responsibility, from which the members of other professions are as a rule exempt. It is the legal duty of every person who undertakes to administer medical or surgical treatment, or to do any other lawful act of a dangerous character, requiring special knowledge, skill, attention or caution, to employ in doing it a common amount of such knowledge, skill, attention, and caution (Stephen, *Dig. of Crim. Law*, 217). If it can be shown that a qualified, or unqualified, practitioner has caused the death of his patient, through the lack of such knowledge, skill, attention, or caution, he may be convicted of manslaughter (*R.* v. *Long*, 1830, 4 Car. & P. 398). But evidence of negligence, which would be sufficient to be left to a jury in a civil action, is not necessarily sufficient to justify a conviction on a criminal charge. It should be shown that the accused acted recklessly, or with a criminal intent, or with such gross negligence as to come within the meaning of the word "felonious" (*R.* v. *Ellis*, 1834, 2 Car. & Kir. 470; *R.* v. *Webb*, 1834; 1 Moo. & R. 405; *R.* v. *Noakes*, 1866, 4 F. & F. 920; see also MANSLAUGHTER).

PHARMACOPŒIA.—The Council were also directed (Act of 1858, s. 54) to cause to be published, and from time to time republished and amended, a book containing a list of medicines and compounds, and the manner of preparing them, together with the true weights and measures by which they are to be prepared and mixed, and containing such other matter and things relating thereto as they should think fit, to be called the British Pharmacopœia. By a subsequent Act of 1862 (25 & 26 Vict. c. 91), the exclusive right of publishing the pharmacopœia was vested in the General Council, and similar but different pharmacopœias previously published by the Colleges of Physicians in England, Scotland, and Ireland were superseded. See also BRITISH PHARMACOPŒIA; CHEMIST.

NOTIFICATION OF DISEASE.—The Infectious Diseases Notification Act, 1889 (52 & 53 Vict. c. 72), made general throughout the country provisions which previously had been adopted in various local Acts. It is in force in the Metropolis, and districts where it has been adopted by the local sanitary authority. Where it is in force, every medical practitioner attending on or called in to visit a patient suffering from an infectious disease—not being an inmate of a hospital for infectious cases—" shall forthwith, on becoming aware that the patient is suffering from an infectious disease, send to the medical offier of health of the district a certificate stating the name of the patient, the situation of the building," etc., where he is, and the infectious disease from which, in his opinion, the patient is suffering (s. 3). He is entitled to a small fee for every certificate duly sent in by him. See also INFECTIOUS DISEASES.

Medicine Stamps.—Taxation is imposed on what are termed patent medicines or proprietary articles. Its incidence and levy are regulated by a series of Acts known as the Medicine Stamp Acts of 1802 (42 Geo. III. c. 56), 1803 (43 Geo. III. c. 73), 1804 (44 Geo. III. c. 98), and 1812 (52 Geo. III. c. 150).

There are two duties, both duties of EXCISE (27 & 28 Vict. c. 56, s. 6):—

1. A licence duty of 5s. (1875, c. 23, s. 8) a year, payable by every person dealing in medicines subject to duty. It is granted by the Com-

missioners of Inland Revenue, and runs from the date of issue to the next September 1.

Sale without a licence entails a forfeiture of £20 (1802, c. 56, ss. 8, 9). The licence is not needed by a licensed auctioneer selling in accordance with the law of his licence (1864, c. 56, s. 14).

2. A duty on each packet, box, bottle, pot, phial, or enclosure containing any dutiable article, regulated by the price of the article (1804, c. 98, ss. 2, 8, Sched. B)—

Price not exceeding—	Duty
1s.	1½d.
2s. 6d.	3d.
4s.	6d.
10s.	1s.
20s.	2s.
30s.	3s.
50s.	10s.
over	£1.

The Act of 1812 contains a long list of proprietary articles made liable to duty, few or none of which are still on sale, and a general definition, which renders dutiable all preparations to be used and applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, wherein the maker or vendor has, or complains to have, any occult secret or art for the making, or any exclusive right or title to make, or which are made, under the authority of letters patent, or which are recommended to the public by any public notice, advertisement, price list (*Smith* v. *Mason*, [1894] 2 Q. B. 363), or handbill, or by any label affixed, as nostrums or proprietary medicines or specifics, or as beneficial to prevent, cure, or relieve any malady or disorder incident to or anywise affecting the human body (1812, c. 150, Sched.).

It does not extend to medicinal drugs vended uncompounded, or to medicines made up, under prescription or otherwise, by qualified medical men, chemists, and druggists, without any of the claims or advertisements above stated, nor to confectionery unless sold as medicines or specifics (1815, c. 184, s. 54). Mineral waters were included until 1833 (3 & 4 Will. IV. c. 97, s. 20), but are now exempt, even if advertised as possessing medicinal qualities (*A.-G.* v. *Lamplough*, 1878, 3 Ex. D. 214).

There is an unrepealed section (1812, c. 150, s. 4) allowing sale of artificial mineral waters by victuallers for consumption on their premises, which, however, seems virtually abrogated by the Act of 1833.

The duty is denoted by labels or wrappers with the duty impressed, prepared by the Inland Revenue and purchased from them by the makers, and affixed before the article is first sold or first put on sale (1802, c. 56, ss. 3, 10, 11, 18; 1812, c. 150, s. 2).

The maker must also inform the Inland Revenue of the place of manufacture (1802, c. 56, s. 17), and mark each dozen of the dutiable articles before issue for retail or export (1803, c. 73, s. 3). Fraudulent use of labels a second time and purchase with that object are punishable (1802, c. 56, ss. 13, 14), and purchasers from the first vendor must see that dutiable articles are properly stamped (1803, c. 73, s. 3).

The pecuniary penalties imposed by the Acts are recoverable before a Court of summary jurisdiction, subject to appeal to Quarter Sessions (1802, c. 56, s. 25). Proceedings for fines, penalties, or forfeitures can be taken

only by the Attorney-General, or the solicitor or some other officer of Inland Revenue (1804, c. 98, s. 10; 1864, c. 56, s. 6; and see EXCISE).

The makers and sellers are not affected by certain of the Pharmacy Acts, but the provisions of the Acts as to duties and licences do not enable persons who have paid the stamp duties to sell proprietary articles containing certain poisons without complying with the law as to the sale of POISONS. Only patented articles containing poison are exempt from that law (1868, c. 121, s. 16; *Pharmaceutical Society* v. *Piper*, [1893] 1 Q. B. 686; *Same* v. *Armson*, [1894] 2 Q. B. 720).

Medio acquietando.—This was a judicial writ to distrain a lord for the acquitting of a mesne lord from a rent which he had acknowledged in Court not to belong to him (Tomlins, *Law Dict.*).

Meeting House Act.—See CONVENTICLE ACT; NONCONFORMIST.

Melius inquirendum.—See AD MELIUS INQUIRENDUM.

Memorandum, in diplomatic language, is generally used of a note exposing the official views of a Government upon a given subject. Sometimes erroneously employed as a synonym of MEMORIAL (*q.v.*).

Memorandum of Association.—See COMPANY.

Memorial.—A memorial required to be registered pursuant to any Act of Parliament relating to the public registering of deeds in England or Ireland is liable to a stamp duty of two shillings and sixpence, unless the instrument registered is chargeable with a less duty than two shillings and sixpence, in which case the stamp on the memorial is the same as on the instrument registered (Stamp Act, 1891, Sched.). See REGISTRATION OF DEEDS.

Memorial (Dipl.)—An official document containing a recital of the facts of a question, and recapitulating instructions already given to a diplomatic agent (*q.v.*). See MEMORANDUM.

Memory, Legal.—See CUSTOM.

Menaces.—The law as to menaces and threats is in few books gathered up under one head, but is found under the titles COERCION, EXTORTION, INTIMIDATION, UNDUE INFLUENCE, and the like, according to the considerations of the civil or penal effect of the use of unlawful means to influence the will of others.

Civil Remedies.—An action will not lie for menaces or threats except

in respect of a contract, induced thereby, for its rescission or avoidance, or in respect of another act induced thereby, by which the person threatened has suffered actual damage. It is doubtful whether threats, falling short of an assault, but producing mental shock, would give a cause of action, having regard to the decisions in *Victorian Railway Commissioners* v. *Coultas*, 1888, 13 App. Cas. 222; and *Mitchell* v. *Railroad Co.*, 1897, 151 New York, 107. But see Beven on *Negligence*, 2nd ed., 76–84; *Bell* v. *G. N. Rwy. Co.*, 1890, 26 L. R. Ir. 428; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

Threats or intimidation whereby a man to his damage is made to abstain from doing what he has a right to do, or do what he has a legal right not to do, are actionable in certain cases. The limits of the civil right of action are fully considered in *Allen* v. *Flood*, [1898] App. Cas. 1, and *Temperton* v. *Russell*, [1893] 1 Q. B. 715, and intimidating circulars have formed a ground for granting injunctions (*Lyons* v. *Wilkins*, No. 1, [1896] 1 Ch. 811; No. 2, 1898, 14 T. L. R. 208).

Quasi-criminal Remedies.—Where a person is threatened under circumstances not amounting to an assault, he is entitled to swear the peace on the person who threatened him. See ARTICLES OF THE PEACE, vol. i. p. 335; *R.* v. *Cork Justices*, 1882, 15 Cox C. C. 149; *Ex parte Seymour*, 1883, 15 Cox C. C. 242.

Criminal Remedies.—1. Menaces and threats of personal violence are punishable at common law when they amount to an ASSAULT.

2. Intimidation of persons under the protection of a Court, such as witnesses or parties to legal proceedings, is a misdemeanour punishable on indictment or summarily as a contempt of the Court. See CONTEMPT OF COURT.

3. It is said that it is an indictable misdemeanour at common law to extort money by actual duress, or by such threats as a common firmness cannot withstand; whether the threat is of violence or of an accusation seriously affecting character; but not where it is a mere threat to bring an action (*R.* v. *Woodward*, 1708, 11 Mod. Rep. 137; 6 East, 133 *n.*; *R.* v. *Southerton*, 1805, 6 East, 126; *R.* v. *Knewland*, 1796, 2 Leach, 721; Russ. on *Crimes*, 6th ed., 346; *R.* v. *Yates*, 1853, 6 Cox C. C. 441). But these offences are for the most part, though not abrogated, superseded by the statutory provisions to be now stated.

4. It is a misdemeanour (1) to threaten to publish any libel upon any other person, or, directly or indirectly, (2) to threaten to print or publish, or (3) to propose to abstain from publishing, or (4) to offer to prevent the printing or publishing of any matter or thing touching any other person, if the act is done with intent (*a*) to extort any money or security for money (including bank notes, 14 & 15 Vict. c. 100, s. 18), or any valuable thing from such or any other person, or (*b*) to induce any person to procure for any person any appointment or office of profit or trust. The punishment is imprisonment, with or without hard labour, for not over three years. This offence is distinct from, and cumulative upon, those next to be enumerated (6 & 7 Vict. c. 96, s. 3).

The term of imprisonment is exceptional, but does not appear to be affected by sec. 1 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69).

It is to be noted that the word "defamatory" is not used in the enactment; in the part as to publishing matter, the matter need not be defamatory (*R.* v. *Coghlan*, 1866, 4 F. & F. 316). And it is a moot point whether a person accused under it can avail himself of the right to plead justification, which exists as to criminal proceedings for defamatory libel (6 & 7 Vict. c. 96, s. 6).

The intent to extort may be proved by circumstantial evidence, without direct evidence of express demand; but an attempt to obtain delivery of an account, or payment of a debt reasonably believed to be due, is not extortionate within the enactment (*R.* v. *Coghlan*, 1866, 4 F. & F. 316). There are numerous felonies, mostly statutory, involving the element of menaces or threats.

5. *Maliciously* to send, deliver, or utter, or directly or indirectly to cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person. The punishment is penal servitude for life or not less than three years (1861, c. 100, s. 16). The word "maliciously" was introduced into the clause in Parliament (3 Russ. on *Crimes*, 6th ed., 348 *n* (*i*)), and does not appear in the other statutory definitions of similar crimes. What it means has not been decided. It is unnecessary to state in the indictment to whom the writing was delivered, and the recipient need not be the person threatened.

6. It is a felony to send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any such produce, or any ship or vessel, or to kill, maim, or wound any cattle. It is punishable by penal servitude from three to ten years (1861, c. 97, s. 50).

There are no decided cases on this enactment, which was in the consolidation of 1861 modified so as to obviate the narrowing effect of decisions on the superseded Acts (9 Geo. I. c. 22, and 4 Geo. IV. c. 54; see Archbold, *Cr. Pl.*, 21st ed., 973).

7. It is a felony to send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing—(1) demanding of any person, with menaces and without any reasonable and probable cause, any property, chattel, money, valuable security, or other valuable thing (1861, c. 96, s. 44); (2) threatening to accuse any other person of any crime punishable in law with death or penal servitude for not less than seven years (this has been rendered nugatory by recent legislation) (see 54 & 55 Vict. c. 69), or of any assault with intent to commit rape, or of any infamous crime (see ABOMINABLE CRIME), with a view or intent to extort or gain by means of the letter or writing any property, chattel, money, valuable security, or other valuable thing from any person. It is punishable by penal servitude for life or not less than three years (1861, c. 96, s. 46).

8. It is also felony to demand by menaces (or by force) any property, chattel, money, valuable security, or other valuable thing of any person with intent to steal it. It is punishable by penal servitude from three to five years (1861, c. 96, s. 45; and see LARCENY).

9. It is also felony to accuse or threaten to accuse either the person to whom the accusation or threatening is made or another of an ABOMINABLE CRIME, with the view or intent to extort from the person accused or threatened with accusation or any other person, any property, chattel, money, valuable security, or other valuable thing. It is punishable by penal servitude for life or not less than three years (1861, c. 96, s. 47).

10. It is the felony known as robbery, an aggravated form of larceny, to steal from the person by means of violence or threats of violence. The offence existed and was capital at common law, but is now punishable by penal servitude from three to fourteen years (1861, c. 96, s. 40; see LARCENY, vol. vii. p. 315).

In the case of all those offences from 5. to 13. imprisonment for not over

two years, with or without hard labour, may be substituted for penal servitude, and the minimum term of which was in each case reduced to three years by sec. 1 of the Penal Servitude Act, 1891 (c. 69, s. 1). Males under sixteen convicted of any of the offences 5.–7. 9. and 11. may be whipped (see JUVENILE OFFENDERS; WHIPPING). The offences are punishable whether committed in the Admiralty jurisdiction or within the realm (1861, c. 96, s. 115; c. 97, s. 72; c. 100, s. 68).

11. It is felony, with intent to defraud or injure any other person, to compel or induce any person by certain unlawful means (1) to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security; (2) to write, impress, or affix his name or that of any other person, copartnership, firm, company, or the seal of a body corporate to any paper or partnership in order that it may be afterwards made or converted into a valuable security.

The unlawful means are—

(*a*) Any unlawful violence to or restraint of or threat of violence to or restraint of the person of another;

(*b*) Accusation or threat to accuse any person of treason, felony, or infamous crime.

The punishment is penal servitude for life or not less than three years (1861, c. 96, s. 48).

The term "valuable security" is wide enough to include an agreement to pay a sum of money to prevent an action (*R.* v. *John*, 1875, 13 Cox C. C. 100).

12. Where an owner or occupier is compelled or induced by threats (or acts) of violence to open his house, the consequent entry, if with felonious intent, is BURGLARY (2 Russ. on *Crimes*, 6th ed., 8); if without such intent, it would appear to be FORCIBLE ENTRY.

13. Theft in a dwelling-house of any chattel, money, or valuable security, if accompanied by any menace or threat which puts some person therein in *bodily* fear is a felony punishable by penal servitude from three to fourteen years (1861, c. 96, ss. 53–61).

The attempt to commit the offence is punishable as any other attempt to steal (and see 14 & 15 Vict. c. 100, s. 9).

It is necessary not only to prove the menaces, etc., and that they were made within or operated within the house (*R.* v. *Murphy*, 1853, 6 Cox C. C. 340), but also that they put someone in the house in bodily fear, *i.e.* fear of physical violence (*R.* v. *Etherington*, 1795, 2 Leach, 671). The menace or threat need not precede nor facilitate the theft.

There is no very appreciable distinction between menaces and threats. For the purpose of robbery, the menace or threat must be of personal violence, or of an accusation or consequence of such a character, as would create an apprehension of bodily fear or would affect and fetter the mind of the person threatened so as to make him part with his property (*R.* v. *Donnally*, 1779, 1 Leach C. C. 229; 2 East P. C. 715; *R.* v. *Stringer*, 1842, 2 Moo. C. C. 261).

In the statutes the word "menaces" is used by itself, and the word "threat" with a specification of the particular form of threat prohibited. But for the purposes of sec. 44 of the Larceny Act, 1861, and, it is submitted, for all cases, a menace is interpreted as meaning not merely a threat of harm or violence to person or property, *e.g.* to set fire to a stack (*R.* v. *Taylor*, 1859, 1 F. & F. 511), but as including also threats to accuse either of crime (*Donnally's* case, above) or to imprison on a false charge (*R.* v. *Robertson*, 1864, 10 Cox C. C. 9), and threats to accuse of misconduct or immorality.

not amounting to a crime (*R.* v. *Miard*, 1844, 1 Cox C. C. 22; *R.* v. *Chalmers*, 1867, 10 Cox C. C. 450; *R.* v. *Tomlinson*, [1895] 1 Q. B. 706). The threats may be by gestures or signs, and need not be by words, except in the cases where writing is made an element in the offence (*R.* v. *Jackson*, 1783, 1 Leach C. C. 267). A threat to take proceedings under a penal statute seems not to be an offence within any of the Acts of 1843 or 1861 (*R.* v. *Yates*, 1853, 6 Cox C. C. 441).

It is immaterial in the case of the offences under secs. 44–48 of the Larceny Act, 1861, whether the menaces or threats are of violence, injury, or accusation, to be caused by the offender or any other person (1861, c. 96, s. 49).

The truth or falsehood of a threatened accusation, whether of crime or misconduct, is absolutely immaterial, and the accused cannot set up the truth as a justification (*R.* v. *Cracknell*, 1866, 10 Cox C. C. 408; *R.* v. *Richards*, 1868, 11 Cox C. C. 43); nor is it any defence to show that after threatening to accuse with intent to extort the defendant actually prosecuted on the accusation (*R.* v. *Redman*, 1866, 35 L. J. M. C. 89). There are conflicting authorities as to whether reasonable or probable cause in No. 7 refers to the threat or to the demand for money (*R.* v. *Hamilton*, 1843, 1 Car. & Kir. 212; *R.* v. *Gardner*, 1824, 1 Car. & P. 479; *R.* v. *Miard*, 1844, 1 Cox C. C. 22). But a threat made in demand of a debt or sum of money in dispute has been held not to be indictable (*R.* v. *Heming*, 1799, 1 Leach C. C. 445 *n.*). Charges for distinct felonies under these heads cannot properly be joined in one indictment (*R.* v. *Ward*, 1864, 10 Cox C. C. 42).

Where the offence is committed by writing, the writing may be uttered or published without being delivered; and the uttering or delivery need not be to the person threatened (*R.* v. *Grimwade*, 1844, 1 Den. Cr. C. 30; *R.* v. *Radford*, 1844, 1 Den. Cr. C. 59). The writing should be set out in full in the indictment, with or without prefatory allegations or innuendoes (*R.* v. *Boucher*, 1831, 4 Car. & P. 562; *R.* v. *Hunter*, 1794, 2 Leach C. C. 625, 631). Its meaning is for the jury, unless it is incapable of construction as a threat (*R.* v. *Carruthers*, 1844, 1 Cox C. C. 138); but to justify conviction the meaning must be reasonably direct and plain (*R.* v. *Girdwood*, 1776, 1 Leach C. C. 142). But it would seem that the prosecutor may be asked what meaning he attached to the letter (*R.* v. *Hendy*, 1850, 4 Cox C. C. 243; *R.* v. *King*, [1897] 1 Q. B. 214), and that declarations by the accused are admissible to show the meaning (*R.* v. *Tucker*, 1826, 1 Moo. C. C. 134).

Where the offence involves a threat to accuse of a crime, the exact crime need not be named (*R.* v. *Tucker*, 1826, 1 Moo. C. C. 134), nor need the threat be to accuse before a Court (*R.* v. *Robinson*, 1837, 2 Moo. & R. 14); but if it is not, the offence is also a threat to publish a libel within No. 4.

[*Authorities.*—Russell, *Crimes*, 6th ed., ii. 96, iii. 346; Archbold, *Cr. Pl.*, 21st ed.; Stephen, *Dig. Cr. Law*, 5th ed.]

Menial Servant—("Menial," an adjective formed from M. E. *meine*, a household (Skeat, *Etymol. Dict.*)). Menial servants are those usually employed in or about a house, or who render personal services to, or are in close personal relationship with, their employers. In the absence of special agreement, their engagement is for a year, the service being determinable by one calendar month's notice, or, on the part of the employer, by paying a month's wages in lieu of notice. No general rule can be laid down

for determining whether servants are menial servants or not; each case depends upon its own facts. The following have been held to be "menial servants":—a head gardener (*Nowlan* v. *Ablett*, 1835, 4 L. J. Ex. 155); a huntsman (*Nicoll* v. *Greaves*, 1864, 33 L. J. C. P. 259); a person engaged to do general work about a garden and stables (*Johnson* v. *Blenkensopp*, 1841, 5 Jur. 870). On the other hand, the housekeeper of a large hotel (*Lawler* v. *Linden*, 1876, 10 Ir. R. C. L. 188) and a governess (*Todd* v. *Kerrich*, 1852, 8 Ex. Rep. 151) have been held not to be "menial servants." See DOMESTICS; MASTER AND SERVANT.

An agreement for the hire of a menial servant is exempt from stamp duty (Stamp Act, 1881, Sched.).

Mens rea.—See GUILTY MIND, vol. vi. p. 125; MALICE.

Mental Infirmity.—See LUNACY, *supra*, at p. 60.

Mercantile Agent.—See PRINCIPAL AND AGENT.

Mercantile Marine Fund.—See MERCHANT SHIPPING.

Merchandise Marks.

A. CONTENTS OF THE ACTS; WARRANTY OF MARKS; ROYAL WARRANTS.

The criminal law of false marking is contained in the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), which re-enacted in an improved form the provisions of the earlier Act of 1862 (25 & 26 Vict. c. 88), and which has since been amended by the Act of 1891 (54 Vict. c. 15). The principal Act (M. M. A., 1887) contains a most important section (s. 16), prohibiting the importation of deceptively or spuriously marked goods into the country, in some cases absolutely, in others unless a qualifying mark indicating the country of origin is appended to the goods (below, *D.*). This section was inserted in accordance with the International Convention for the protection of industrial property, signed at Paris in 1883. The Act contains also special regulations as to watch-case marks (ss. 7, 8); a provision importing a warranty of the genuineness or accuracy of a trade mark or mark or trade description applied to goods which are the subject of a sale, unless the contrary is expressed in a writing delivered at the time of sale, and signed (s. 17; *Starey* v. *Chilworth Gunpowder Co.*, 1889, 24 Q. B. D. 90); and it imposes a penalty for the false representation of royal warrants (s. 20).

The Act in general casts the proof of his innocence upon the person found in possession of or dealing in fraudulently marked goods. But it does not abolish the necessity that to justify a conviction there shall be the criminal intent, or *mens rea*, which is a normal element of every crime. In order to convict, the magistrate or jury must be satisfied, in the result, that the person charged acted with such intent (*Gridley* v. *Swinborne*, 1888, 52 J. P. 739, 791; cp. *Sherras* v. *De Rutzen*, [1895] 1 Q. B. 918).

Unless otherwise stated, the sections cited are from the M. M. A., 1887. They are very much condensed.

B. Offences.

Every person, corporation, or partnership (s. 3 (1)) who does any of the following acts (1)–(5) is guilty of an offence, unless *he proves*, as to (1)–(4), that he acted without intent to defraud, *i.e.* to deceive either the immediate or ultimate purchasers (*Wood* v. *Burgess*, 1889, 24 Q. B. D. 162). As to the defence to (5), see the sub-division itself.

(1) *Forges any trade mark*, or makes, disposes of, or has in his possession for such purpose, any die or instrument (s. 2 (1) *a*, *c*, *e*). *Trade mark* means a trade mark which is either registered in England (see Trade Marks), or is protected by law in any State or British possession to which sec. 103 of the Patents, etc., Act, 1883, has been applied. It is *forgery* (*a*) to make the trade mark itself, or a *colourable* imitation of it (*i.e.* a mark so nearly resembling it as to be calculated to deceive, see Trade Marks), without the assent of the proprietor of the trade mark, proof of which lies on the defendant; or (*b*) to falsify, by alteration, a genuine mark (s. 4).

(2) *Falsely applies any trade mark* (above, (1)), or a colourable imitation (*ibid.*) of a trade mark, to goods (s. 2 (1) *b*). It is an *application* of the mark to goods to apply it to anything, such as a cover or a reel, sold or kept with the goods, or to so use it as to induce the belief that the goods are designated or described by the mark (s. 5 (1)). In *Wood* v. *Burgess* (1889, 24 Q. B. D. 162) the application consisted in refilling soda-water bottles upon which the mark (a name) was moulded. In *Budd* v. *Lucas* ([1891] 1 Q. B. 408) the false description (below, (3)) was contained in an invoice accompanying the goods. It is a *false* application if the mark is applied without the assent of the proprietor, the onus of proof of which is cast on the defendant (s. 5 (3)).

(3) *Applies* (above, (2)) *any false trade description* to goods (s. 2 (1) *d*). The Act does not extend to false descriptions of *quality*, nor to any verbal false descriptions (Kerly on *Trade Marks*, pp. 475, 477). *Trade description* is defined to be any description, statement, or other indication as to the measurement, quantity, or weight, place or mode of production, or the material of the goods, or as to their being subject to an existing patent privilege or copyright (s. 3 (1)). The customs entry relating to imported goods is a trade description applied to the goods (M. M. A., 1891, s. 1), and any figure (qy., numeral; *Ex parte Stephens*, 1876, 3 Ch. D. 659), word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description (s. 3 (1)). The trade description is "*false*" if it is false, *i.e.* untrue, in a material respect of the goods, and whether originally so or by alteration. It is not excused by being part of a trade mark, except in the case of a name or initials. A description by figures, words, marks (s. 3 (1)), a false name or initials (s. 3 (3)), which is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person, whose they are not, is "false" (s. 3 (1)). Conventional or customary descriptions lawfully in use in August 1887 to indicate that the goods are of a particular class or method of manufacture are allowed to be continued, but if they include the name of a place, and are calculated to mislead as to the place of production of the goods, the name of the real place of production must be added (s. 18; cp. below, *D.*). Thus a product of cod-sounds was held to be lawfully described as patent isinglass, having been so known for many years (*Gridley* v. *Swinborne*, 1888, 52 J. P. 739, 791). Real isinglass is made from the sturgeon.

(4) *Causes any of the above offences to be committed* (s. 2 (1) *f*). The

Act does not make a master liable for the unauthorised act of his servant (*Budd* v. *Lucas*, [1891] 1 Q. B. 408). Its object is, however, in every case to lead to a disclosure of the real offender. It exempts from liability persons employed who have unwittingly committed an offence while acting in the ordinary course of business and taking reasonable precautions, on condition that they give information as to the persons on whose behalf the acts were done (s. 6); and also the servants of a master resident in the kingdom who have *bonâ fide* acted under instructions, and have, on demand, given full information as to the master (s. 19). An accessory within the kingdom to an offence committed without it is guilty of the offence (s. 11). See further the next paragraph.

(5) *Sells* or exposes for sale, or has in his possession for sale, trade, or manufacture, any goods or things to which any forged trade mark (above, (1)), false trade description (above, (3)), is applied, or any trade mark or colourable imitation of a trade mark is falsely applied (above, (2)), *unless he proves* that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the mark, etc., *and that*, on demand, he gave to the prosecutor all the information in his power as to the persons from whom he obtained the goods, etc., *or* that otherwise he acted innocently (s. 2 (2)).

C. Prosecution, Evidence, Search Warrants, Punishment, Forfeiture.

(1) The offences under the Act may be prosecuted under the Summary Jurisdiction Acts, but the defendant has an option to be tried upon indictment, and he must be informed of this before the charge is gone into (s. 2 (6)). The Board of Trade are empowered to prosecute (M. M. A., 1891, s. 2), and so also are the Board of Agriculture (57 & 58 Vict. c. 19). The prosecution must be commenced within three years from the offence, or one year from its discovery by the prosecutor, whichever is the earlier (s. 15). It is within the Vexatious Indictments Act, 1860. The Court has power to award costs against either prosecutor or defendant (s. 14). There is an appeal to the Quarter Sessions (s. 2 (5)). Other proceedings, including discovery in an action, are not affected by the Act (s. 19).

(2) The defendant and his wife may give evidence (s. 10). If evidence that the defendant acted without intent to defraud (above, *B.*), or innocently (*B.* (5)), is given, the prosecutor may give rebutting evidence, *e.g.* as to antecedent similar acts (*Budd* v. *Lucas*, [1891] 1 Q. B. 408).

Search warrants may be issued (s. 12), and there is a power to forfeit the things found, though no one is convicted (s. 12 (2)).

(3) The punishment on indictment is fine and imprisonment, the latter not exceeding two years. On summary conviction the imprisonment is limited to four months with or without hard labour, and the fine to £20 for a first, and to six months and £50 for any subsequent conviction. The things by means of or in relation to which the offence was committed may be forfeited (s. 2 (3) (4)). They may be sold, and any innocent party compensated out of the proceeds (ss. 2 (4), 12 (3)).

D. Prohibition on Importation.

Made in Germany.—It is prohibited (by a reference to sec. 42 of the Customs Act, 1876) to import either goods liable to forfeiture under the M. M. A. (above, *C.* (3)), or goods of foreign manufacture bearing any name or trade mark being, or purporting to be, the name or mark of any manufacturer, dealer, or trader in the United Kingdom, *unless* (in the latter case)

they are accompanied by a definite indication of the country where the goods were made or produced (s. 16). It is to this prohibition that the familiar legend "made in Germany," etc., owes its origin. The Act does not affect unmarked goods, but it requires those which bear or are marked with any trade description (*B.* (3)), which would be "false" (*B.* (3)) if unqualified, to be so qualified as not to mislead. Thus if goods bear the name of an English manufacturer (s. 16 (1)), or a name which is that of, or is a colourable imitation of that of, a place in the United Kingdom (s. 16 (4)), or if they are marked with English words (*B.* (3); cp. s. 3 (1)), the name or words are taken, unless qualified by an express indication of the true country of origin, to be a description that the goods are of English origin.

The Commissioners of Customs have power to make regulations for carrying out the Act, and they have issued a large number of orders (Kerly on *Trade Marks*, App. 14). Their officers are required to stop, and in some cases to destroy, the prohibited goods. The Commissioners construe the Act to apply to goods in transit, but not to unmanufactured goods.

Evidence of the port of shipment is *primâ facie* evidence of the place of origin of the goods (s. 10 (2)). See also WATCH.

[*Authorities.*—Text-books: Gray (1888), Sebastian (1890), Safford (1893), Kerly (1894).]

Merchant Shipping.—The law as to merchant shipping is now consolidated in the Merchant Shipping Act, 1894, and will be found under the headings of its various branches in this work, viz.: the law with regard to the ownership and management of and jurisdiction over British ships, under BRITISH SHIP; the management of foreign ships in British jurisdiction, under FOREIGN SHIP; masters of British and foreign ships, under SHIPMASTER; seamen of British ships, under SEAMAN; and that concerning seamen of foreign ships, under FOREIGN SEAMAN; and under this latter head a seaman deserting from foreign ships in British jurisdiction, belonging to a country which gives due facilities for recovering and apprehending seamen deserting from British ships in that country, may (if an Order in Council so provide) be apprehended on the application of the consular officer of that country, and conveyed on board his ship, and any person harbouring or secreting such a deserter is liable to a fine of £10 (s. 238). The law relating to fishing-boats and their crews will be found under FISHING-BOATS; that relating to passenger and emigrant ships, under PASSENGERS (SEA); safety of ships in navigation, under AFFREIGHTMENT, BRITISH SHIP, COLLISIONS, GRAIN CARGO, LIFE-SAVING APPLIANCES, LOAD-LINE; shipping inquiries and Courts, under SHIPPING INQUIRIES, *Navy Courts*, SURVEY COURTS; loading, carriage, and delivery of goods, under CARGO; the liability of shipowners, under LIMITATION OF LIABILITY; wreck and salvage, under SALVAGE and WRECK; pilotage, under PILOT; and light-houses, under LIGHTHOUSE. The present article accordingly only deals with the administration and control of the mercantile marine.

The Board of Trade is the department which undertakes the general superintendence of all matters relating to merchant shipping and seamen, and is authorised to carry into execution the provisions of all Acts relating to merchant shipping and seamen, except where it is otherwise therein provided or so far as the revenue is concerned (s. 713). All consular officers and officers of customs abroad, and local marine boards and superintendents, must make and send to the Board any returns or reports on any matter relating to British merchant shipping or seamen required by

it (s. 714); and all superintendents when required by the Board must produce to it or its officers all official log-books and other documents delivered to them under the Act (s. 715). The Board prescribes the forms for all books, instruments, or papers required by the Act, except those for bills of sale, mortgages, and transfers of mortgages, which are prescribed by the Commissioners of Customs, and can be altered by them with the consent of the Board of Trade (s. 65); documents properly issued by it are admissible in evidence; and instruments used by authority of the Board in connection with masters and seamen, safety in navigation, lighthouses, and the Mercantile Marine Fund are exempt from stamp duty (ss. 719–721); and any offence with regard to use of such forms, such as forging or altering them, is liable to a penalty of £10 (s. 722).

Compliance with the provisions of the Act may be enforced by officers of the Board of Trade, commissioned officers of the Royal Navy on full-pay, British consular officers, the Registrar-General of Shipping and Seamen or his assistant, chief officers of customs, and superintendents, who are given certain powers for that purpose, such as requiring production of official log-books, and of a list of the persons on board, taking copies of the official log-books, requiring them to be explained, and mustering the crew; and failure to comply with a requirement of any of the above officers is punishable by a penalty of £20 (s. 723).

The Board of Trade also may appoint, either generally or for special purposes, surveyors of ships for the purposes of the Act (and also a surveyor-general of ships) at such ports as it thinks fit, to act in accordance with the Board's regulations. They have power to go on board steamships and inspect them and articles on board them at any reasonable time, and may require them if necessary to be taken into dock for the purpose of surveying their hulls, and any person hindering them in performing their duties is liable to a fine of £5; they make returns to the Board of the result of their surveys; and a refusal to supply them with information by an owner, master, or engineer entails a penalty of £5 (s. 726). In British possessions the governor may appoint surveyors for this purpose (s. 727). The Board may also appoint inspectors to report on any accident or damage sustained or caused by a ship, or whether the provisions of the Act have been complied with, or as to the condition of the hull and machinery of any steamship; such inspector has powers of entering and inspecting ships or premises, and requiring the attendance of persons and examining them, and requiring and enforcing the production of books, papers, or documents, and administering oaths and requiring a declaration of the truth of statements made to him; a penalty of £10 is imposed on any person refusing to come before him or to do anything he lawfully requires of him, and on any person wilfully impeding an inspector in the performance of his duty (ss. 728 and 729).

Local marine boards are also entrusted, subject to the control of the Board of Trade, with carrying into effect the provisions of the Merchant Shipping Act. These boards are established at such ports as the Board determines, and are constituted of the mayor or provost and the stipendiary magistrate (or, if there be more than one, such of them as the Board chooses), four members appointed by the Board from among persons residing or having places of business at the port or within seven miles of it, and six members elected by the owners, from among themselves, of foreign-going and home-trade passenger ships registered at the port. Such appointments and election take place every third year, and provision is made for filling up vacancies; the register consists of lists of electors, which are made out

triennially, posted at the custom house, and are revised by justices before the election (Sched. 7 of the Act). These boards may regulate their mode of meeting and conducting their business, but their quorum must not be less than three, and they must keep minutes of their proceedings; but no act or proceeding of theirs is vitiated or prejudiced by reason of any irregularity in election of members, or error in list of voters, or irregularity in making or revising that list, or any not duly qualified person acting on the board, or any vacancy on the board (s. 244). These boards must send such reports and returns to the Board as it requires, and all their minute-books and documents must be open to the inspection of the Board; if they fail to meet or discharge their duties, the Board may take into its own hands the performance of their duties till the next election, or order a new election to take place at once; and any appointments or arrangements made by such board, if unsatisfactory or improper for the port, may be annulled by the Board (s. 245). These boards may appoint a medical inspector of ships, and a medical inspector of seamen for the port (s. 204). They must maintain mercantile marine offices with the requisite buildings, superintendents, deputies, clerks, and servants; and such offices and their business are controlled and regulated by them, subject to the sanction of the Board to the number of persons appointed and their salaries and wages and other expenses, and to the immediate control of the Board over such office as regards the receipt and payment of money thereat, and to the power of the Board to remove any servant of the marine board in such office, and provide for the performance of his duties till his successor is appointed, and subject to the power of the Board to appoint a mercantile marine office in any sailors' home in the port of London which then becomes subject to the immediate control of the Board, and not that of the local marine board (s. 246 (2)). Mercantile marine offices may also be maintained at such ports where there is no local marine board as the Board of Trade determines; these are subject to the immediate control of the Board, and may be set up at the custom house in such ports, with the consent of the Commissioners of Customs (*ibid.* (3)). The general business of superintendents of mercantile marine offices (in the Act called superintendents) is, to afford facilities for engaging seamen by keeping registries of their names and characters; to superintend and facilitate the engagement and discharge of seamen; to provide means for securing the presence on board at the proper times of seamen so engaged; to facilitate the making of apprenticeships to the sea service; and generally to perform the other duties relating to seamen, apprentices, and ships imposed on them, *e.g.* transmitting lists of crew to a registrar (s. 256), receiving official logs (s. 242), issuing a warrant for apprehending a seaman or apprentice in a fishing-boat charged with (*inter alia*) desertion, etc. (s. 380), and settling disputes as to wages or provisions of fishing-boats (s. 387). Any act done before a deputy is equivalent to its being done before a superintendent (s. 247). Officers of local marine boards are "clerks or servants" within the meaning of the Larceny Act (see LARCENY); and any person fraudulently applying or disposing of any chattel, money, or valuable security received by him (while in such office or service) for or on account of any local marine board or public board or department, for his own use or any other use than that for which it came into his hands, or fraudulently withholding, retaining, or keeping back the same or any part of it, contrary to lawful directions and instructions in such office or service, is guilty of embezzlement within the Larceny Act (*q.v.*) (s. 248).

The Board of Trade may dispense with the necessity for the transaction

of matters required by the Act to be done in mercantile marine offices, and such matters, if otherwise duly transacted, are as valid as if they had been there done (s. 249). No fees except those provided by any Act, or authorised by the Board of Trade, may be taken at any mercantile marine office for any business required to be done there, under a penalty of £20, and dismissal (s. 250).

All moneys (except by way of fine or forfeiture) payable under the Merchant Shipping Act to public servants or authorities go to a fund known as the "Mercantile Marine Fund." This fund receives (*a*) all fees and expenses payable for the survey or measurement of ships; (*b*) all fees and other sums (other than fines and forfeitures) received by the Board of Trade for certificates of competency of officers of ships (s. 97), survey of ships for the purpose of the Collision Regulations (s. 420), necessary survey of an alleged unseaworthy ship (s. 463, and see s. 716), and for medical inspection of seamen (s. 203); (*c*) the proceeds of unclaimed property of deceased seamen, except where such have to be paid according to the directions of the Accountant-General of the Navy; (*d*) sums received by the Board of Trade towards expenses incurred in relation to distressed seamen and apprentices; (*e*) all fees payable in respect of services performed in connection with passenger and emigrant ships, *e.g.* certificates of surveys (s. 277); (*f*) fees paid upon engaging or discharging crews of fishing-boats before a superintendent; (*g*) proceeds of sale of unclaimed wreck (during Her Majesty's lifetime); (*h*) fees of receivers of wrecks; (*i*) light dues and other sums received by lighthouse authorities; (*k*) costs and expenses ordered by the Court to be paid to the Board of Trade under the Boilers Explosions Acts (s. 676).

The following expenses are chargeable on the Mercantile Marine Fund, so far as they are not paid by any private person: (*a*) salaries and expenses connected with local marine boards and offices and examinations for certificates of competency whether in ships or fishing-boats; (*b*) salaries of surveyors and officers and expenses in connection with surveying and measuring ships, and payment of medical inspectors and seamen; (*c*) salaries of persons employed in connection with passenger and emigrant ships; (*d*) superannuation allowances, gratuities, pensions, and other allowances to such surveyors, officers, or persons; (*e*) allowances and expenses for relief of distressed British seamen and apprentices, including contributions to seamen's refuges and hospitals (ss. 190–194); (*f*) sums which the Board of Trade thinks fit to pay in respect of claims to moneys on account of the property of deceased seamen or of the proceeds of wreck; (*g*) expenses of depositions, reports, and returns respecting wrecks and casualties; (*h*) expenses incurred in connection with the duties of receivers of wreck; (*i*) expenses of the general lighthouse authorities; (*j*) pensions or other sums payable for the duties formerly performed by the Trinity House in respect of cartage and ballastage in the Thames; (*k*) expenses of the lifeboat service and helping to save life and property in case of shipwreck and distress at sea, and rewarding the saving of life in such cases as the Board of Trade directs; (*l*) reasonable costs, allowed by Board of Trade, of advertising or making known the establishing or altering of foreign lighthouses, buoys, and beacons to owners, masters, and others interested in British ships; (*m*) costs and expenses of the Board of Trade under the Boiler Explosions Acts, and remuneration paid thereunder, and costs and expenses therein ordered to be paid by the Board of Trade (s. 677).

The Mercantile Marine Fund also receives a subsidy from Parliament of an amount determined by the Treasury with the concurrence of the Board

of Trade (s. 678); its accounts are "public accounts" under the Exchequer and Audit Departments Act (1866, 29 & 30 Vict. c. 39), and are examined and audited accordingly; and as soon as possible after the meeting of Parliament in each year the accounts of the Mercantile Marine Fund for the preceding year must be laid before it by the Board of Trade (s. 679). In connection with lighthouse expenses, the Mercantile Marine Fund may be advanced money by the Treasury on the security of the fund, and the payments, dues, rates, and fees payable thereto, up to a total outstanding limit of £200,000; and it may be mortgaged by the Board of Trade to private persons or the Public Works Loan Commissioners (ss. 661–663).

[*Authority.*—See Temperley, *Merchant Shipping Act.*]

Merchants' Risk.—This expression in a charter-party has been construed not to exclude the charterer's right to general average contribution by the shipowners in respect of deck cargo properly jettisoned (*Burton* v. *English*, 1883, 12 Q. B. D. 218). It would "clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible" (per Bowen, L.J., at p. 223). Cp. the ruling that the "owner's risk rate" of a railway company (who are bound to carry without making unreasonable conditions) does not exempt the company from liability for losses by negligence (*Mitchell* v. *London and Yorkshire Rwy. Co.*, 1875, L. R. 10 Q. B. 256), or from the duty to deliver within a reasonable time (*Robinson* v. *Great Western Rwy. Co.*, 1865, 35 L. J. C. P. 123; *D'Arc* v. *London and North-Western Rwy. Co.*, 1874, L. R. 10 C. P. 325).

Mercy.—See PARDON. Juries in returning a verdict of guilty on an indictment, if they consider that there were extenuating circumstances, add to the verdict a rider recommending the convict to mercy. In the case of an offence not capital this amounts to a request to the judge to be lenient in sentence. On a conviction of a capital offence, the judge can only pronounce or record sentence of death and transmit the recommendation to the Home Office for consideration by a Secretary of State before determining whether the extreme sentence should be executed or commuted for some lesser punishment.

Mere Motion.—See LETTERS PATENT; PATENTS.

Merger.

TABLE OF CONTENTS.

Definition	366	Extinguishment	369
Requisites	367	Suspension	369
Estates *en autre droit*	367	Extinguishment of Rent-Charges, etc.	369
Quantity of Estates for the Purposes of Merger	368	Extinguishment of Equitable in Legal Estate.	369
Estates for Years	368	Extinguishment of Encumbrances	370
Merger distinguished from—		Doctrine of *Toulmin* v. *Steer*	370
Surrender	369		

Merger is the destruction or "drowning" by operation of law of the less in the greater of two estates coming together and vesting without any

intervening estate in one and the same person in the same right. "Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be *merged*, that is, sunk or drowned in the greater (2 Black. *Com.* 177). The definition above given adds *in the same right*; the appropriateness of the addition will be discussed later. The undisputed requisites for *merger* to take place are—

1. Two estates.
2. Vesting in the same person at the same time.
3. The estates must be *immediately* expectant one on the other.
4. The expectant must be larger than the preceding (particular) estate.

Although the principle that there can be no merger unless both estates are held in the same right is clearly laid down by Blackstone (*loc. cit.*), we find subsequent writers drawing a distinction between estates coalescing by act of law and estates coalescing by act of party; in the former case it was held that merger did not take place, *e.g.* a term held by the heir as executor of his ancestor would not merge in the inheritance descending upon him (*Vincent Lee's* case, 3 Leon. 110). But, on the other hand, where the coalition of the two estates was brought about by act of party, the general opinion was that merger did take place (cp. Preston, *Conv.* vol. iii. pp. 314, 315). "Notwithstanding one of two estates may be held in trust and the other be held beneficially by the same person, or that both estates may be held by the same person on the same or different trusts . . . the doctrine of merger will operate on these estates. For, as to legal estates, the exception to the application of this doctrine extends to those instances only in which one person has the *legal* ownership of several estates in different rights . . . and in which the law, as distinguished from equity, takes notice of these different rights."

But this doctrine has been doubted. In *Chambers* v. *Kingham*, Fry, J., said (1878, 10 Ch. D. 743): "It appears to me that in the absence of special circumstances a term held by a person in his own right does not merge in the reversion held by the same person as an administrator"; and see *In re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227; and Challis, *R. P.* p. 82. And whatever the exact doctrine of the common law may have been in this respect, the question of whether estates were held in the same right was decided without looking to equitable or beneficial interests, legal rights and legal estates alone being considered. Equity, nevertheless, would in every case interfere to preserve beneficial interests from being destroyed by the merger of two legal estates. And by the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25, subs. 4), it is enacted that there shall not, after the commencement of the Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. In view of these provisions, the distinction, if any, made by the common law becomes of no practical importance. The words of the Act have been interpreted to mean that "where there would not be a merger both at law and in equity, then the merger shall not follow, shall not be concluded, because it would operate at law; but that where there would be a merger both at law and in equity, then the merger is to exist, notwithstanding the provisions of the Act." Accordingly, where lands were devised to two successive tenants for life, and the first being too old to manage the lands, etc., conveyed the lands to the second tenant for life to hold to him, his heirs and assigns to the use that the grantor might thereout receive a rent-charge of £400, and subject thereto to the use of the second tenant for life, his heirs and assigns during the

life of the grantor, and the second tenant for life died first, it was held that, having regard to the intention of the parties, there was no merger of the estate *pur autre vie* in the life estate of the second tenant for life (*Snow* v. *Boycott*, [1892] 3 Ch. 110).

Estates for years and at will merge in any estate of freehold, and estates of freeholds not of inheritance will merge in freeholds of inheritance. An estate for one's own life is the greatest of all estates for life, and, accordingly, an estate *pur autre vie* will merge in it. The important exception to the doctrine of merger is that an estate tail will not merge in a fee-simple in reversion. This is the effect of the construction, in accordance with its true intent, of the Statute de Donis. For were this not so, the tenant in tail who acquired the reversionary fee-simple might by merger defeat the claims of his issue, thus acquiring those very powers of disposition and alienation that the law so peristently denied to estates tail (*Wiscott's* case, 2 Rep. 6; *Kynaston* v. *Clarke*, 2 Atk. 204). This objection does not apply to base fees (*q.v.*), and they accordingly did merge in the fee-simple. And the Fines and Recoveries Act now provides (3 & 4 Will. IV. c. 74, s. 39) that whenever a base fee and the immediate reversion or remainder shall after the passing of the Act be united in the same person, then the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under the Act, if such reversion or remainder had vested in any other person. As to estates for years, all are of the same "quantity," independently of the length of the term, but, nevertheless, a reversionary estate for years is deemed for the purposes of the doctrine of merger greater than any other class of estate for years, and such latter estate will merge in it even though the term in reversion be of shorter duration (*Hughes* v. *Robotham*, 2 P. Wms. 236; *Stephens* v. *Bridges*, Madd. & G. 66; 22 R. R. 242). Whether, however, an estate for years will merge in another which is in remainder and not in reversion has never been decided, and (in view of the conflicting opinions of eminent writers) must be considered doubtful.

Interests falling short of being *estates*, but being possibilities of an estate only (see ESTATES), such as an *interesse termini* or a contingent remainder, are neither subject to, nor can they, on the other hand, by interposition, prevent merger (see CONTINGENT REMAINDER; INTERESSE TERMINI). It was to avoid the destruction by the premature ending of the particular estate of freehold (among other ways) by merger that the device was resorted to of appointing "trustees to preserve contingent remainders." Such trustees having an actual estate in the land intervening between two estates which would, but for such intervention, have merged, the contingent interest could no longer be defeated by merger. On the same principle quasi-contingent remainders in copyholds are protected from destruction by the estate of the lord of the manor (*Pickersgill* v. *Grey*, 1861, 30 Beav. 352). And contingent remainders were finally preserved by statute from destruction in this way (as well as by forfeiture and surrender) by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 8, repealing the like provisions of 7 & 8 Vict. c. 76), as to the contingent remainders existing at any time after 31st December 1844.

As to the Effect of Merger on Persons who have Claims on the Merged Estate or Interest derived thereout.—"It would not be consistent with the principles of justice," says Preston (3 *Conv.* 448), "that a man should, by his own act, discharge himself from his own lease or other encumbrance." The derivative interest may be benefited but cannot be prejudiced by merger. And but for the statutory remedy hereinafter mentioned, when a tenant for life makes a lease for years at a rent, and the estate for life subsequently

merges, the relationship of landlord and tenant ceases, and the remedies (*i.e.* in respect of rent and the other covenants) cease together with the reversion to which they were originally incident (*Lord Treasurer* v. *Barns*, Moo. 94; *Webb* v. *Russell*, 1789, 3 T. R. 393; 1 R. R. 725). But the Real Property Act, 1845 (8 & 9 Vict. c. 106), remedied the injustice by providing (s. 9) that when the reversion expectant on a lease made either before or after the passing of the Act shall, after the passing of the Act, be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the tenements or hereditaments leased shall, to the extent and purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease. So that now when the reversion originally expectant on the lease merges, the owner of the next estate is in the position of landlord with all the landlord's rights. See LANDLORD AND TENANT.

We have dealt hitherto only with cases of *merger* proper. Merger differs from surrender in that the former takes place by operation of law only, the latter by act of party, and the distinction is therefore clearly marked. Merger is, however, frequently confused with what is technically called "extinguishment." In extinguishment the annihilation or destruction is not that of one estate by coalescing with another in the *same* land, but a destruction of an estate or right or interest collateral or issuing out of the land by being united with an actual estate in the land—a destruction of the adjunct in the principal, *e.g.* rent-charges, easements, and *profits à prendre* are *extinguished* when they come to coexist and unite in the person entitled to an estate in the land to which they are collateral, provided that such estate is of the same or greater quantity as the rent-charge, easement, etc.

"Extinguishment is the annihilation of a collateral thing or subject in the subject itself out of which it is derived. That the estate in the rent, etc., ceases is the consequence of the extinguishment of the subject itself . . . under the doctrine of merger the subject may continue after the annihilation of one estate in another . . . for the effect of merger is only to involve the time of one estate in the time of another estate, or, at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment correctly taken are applicable to the things themselves rather than the estates or degrees of interest therein" (3 Preston, *Conv.* 9, 10). Suspension is partial extinguishment for a time only, and takes place when the estate in the land is less than the estate in the collateral thing, and when the two cease to coexist (by determination of the estate in the land), the estate in the thing collateral revives. For details as to the extinguishment and suspension of easements, rents, and *profits à prendre*, and other incorporeal hereditaments, we must refer the reader to the respective titles of EASEMENT, RENT, etc. We may notice, however, the exceptional case of tithes and tithe rent-charges. These are not looked upon as collateral for the purposes of extinguishment in the land out of which they arise, but by virtue of statutory provisions in that behalf they may, by a declaration by deed, to be approved by the Board of Agriculture, be merged or extinguished in the land (see TITHES; and 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64, ss. 1, 2, and 4; 2 & 3 Vict. c. 62, ss. 1–6; and 9 & 10 Vict. c. 73, s. 19).

Two other instances of extinguishment may be noticed shortly for the purpose of cross reference, viz. (1) of equitable estates, (2) of charges and encumbrances.

It has been stated as a universal proposition that wherever the legal and equitable estates uniting in the same person are coextensive and commensurate, the latter is absorbed by the former. "The better phrase is that it no longer exists" (*Phillips* v. *Brydges*, 1796, 3 Ves. 120; *Selby* v. *Alston*, 1797, 3 Ves. 339; 4 R. R. 10). This is also sometimes loosely called merger. When this happens the legal estate necessarily controls the devolution or other incident wherein the two estates may happen to differ, *e.g.* where A. took an equitable estate under his father's will equal and coextensive with the legal estate descended to him under his mother's intestacy, the equitable "merged" in the legal estate, and on his death intestate the descent was regulated by the legal estate (*In re Douglas, Wood* v. *Douglas*, 1884, 28 Ch. D. 327). See LEGAL ESTATE; TRUSTS.

Extinguishment of Encumbrances.—The doctrine that an encumbrance paid off by a purchaser of the encumbered property is under certain circumstances extinguished, is known as the doctrine in *Toulmin* v. *Steer*, 3 Mer. 210; 17 R. R. 67. It has been said of this doctrine (in *Stevens* v. *Mid-Hants Rwy. Co.*, 1873, L. R. 8 Ch. 1064): "It is quite right that an intermediate encumbrancer should not be prejudiced by any dealings between his debtor and another encumbrancer. At the same time it is not for this Court to find some recondite technical ground for giving a man a benefit at the expense of another man who was under no liability to pay him." And the doctrine, at all events so far as recognised, may be said to amount to no more than that, in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off encumbrances. The purchaser, with notice (actual or constructive) of other encumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against other encumbrancers, of whose securities he has notice, to say afterwards that the encumbrances so paid off are not extinguished (Jessel, M. R., in *Adams* v. *Angel*, 1877, 5 Ch. D. 634). The case of *Adams* v. *Angel* has been recently approved and followed in *Thorne* v. *Cann*, [1894] App. Cas. 11, and in *Liquidation Estates, etc., Co.* v. *Willoughby*, [1896] 1 Ch. 726), and the following principles clearly established as guiding Courts of equity:—(1) The mere fact of payment off is not enough to cause extinguishment; (2) the intention, express or implied, must be looked at. Accordingly, if the payment off is by a tenant for life, the charge is not extinguished but is kept alive for his benefit as against the inheritance, and this quite independently of any expressed intention, it being presumed that as it is so manifestly for his benefit that the charge should not be extinguished, he intends that it should not be. Where, however, it is the owner of the inheritance that pays off the charge, the presumption is in favour of extinguishment. The presumption is, however, capable of being rebutted by expressly "keeping the charge alive" or declaring an intention so to do. And where the existence of a charge would be beneficial (*i.e.* as against subsequent encumbrancers), equity will presume an intention not to extinguish it. The principles applicable to an owner of the inheritance apply to a purchaser who pays off a charge.

Semble "if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser *afterwards* finds that it would have been better for him to have kept the charge alive" (per Lindley and Smith, L.JJ., in *Liquidation Estates, etc., Co.* v. *Willoughby, loc. cit.* at p. 735). But this decision was overruled in H. L. 1898, W. N. 29.

See MORTGAGE.

Meritorious Consideration.—See FRAUDULENT *Conveyances*, vol. v. p. 505.

Merits, Affidavit of.—See SUMMARY JUDGMENT.

Mersey.—The navigation of the Mersey is now governed by regulations made by Order in Council of August 3, 1897, under the Mersey Channels Act, 1877 (60 & 61 Vict. c. 21), and the Merchant Shipping Act, 1894 (s. 421 (2)). These regulations being made under a statutory power are equivalent to the General Regulations, and, consequently, any infringement of them, which might possibly have contributed to bring about a collision which actually takes place, makes the vessel guilty of that infringement to blame for the collision (*The Lady Devonshire*, 1878, 4 P. D. 26; *The Vera Cruz*, 1884, 9 P. D. 88; *The Talbot*, [1891] Prob. 174). In the case of vessels being launched in the Mersey (as in any other river), it has been held to be necessary to take due precautions and give reasonable and sufficient notice to prevent any injury to passing vessels, such as having a tug in attendance decorated so as to show that a launch is imminent, and to warn approaching ships (*The Glengarry*, 1874, 2 P. D. 235; *The Andalusian*, 1877, *ibid.* 231; *The George Roper*, 1883, 8 P. D. 119). If such precautions are taken, the ship launched is not liable for a collision between her and another ship which has been warned to keep out of the way (*The Cachapool*, 1881, 7 P. D. 217). For the law as to pilotage in the Mersey, see PILOT. A ship carrying salt in the Mersey, but not going farther out to sea than the limits of the port of Liverpool, is not a "seagoing ship" within sec. 260 of the Merchant Shipping Act, 1894, so as to permit of summary proceedings being taken for offences against discipline by her crew (*Salt Union* v. *Wood*, [1893] 1 Q. B. 370). The Mersey Docks and Harbour Board is the harbour authority of Liverpool (see HARBOURS), and as such has been allowed to claim damages for the loss of the use of a dredger sunk by collision with a negligent ship, on evidence that the dredger could have been let weekly for a considerable sum, and that during her disablement the work of deepening the river had been retarded (*The Greta Holme*, [1897] App. Cas. 396).

Merton, Statute of—A statute, or series of statutes, passed at Merton in 1235. The chapters still unrepealed are ii., iv., and ix. Chapter ii. enables widows to bequeath by will the crop of their lands; chapter iv. enables lords to approve, that is, enclose waste lands, provided they leave sufficient common of pasture for the freeholders,—a power now only exercisable with the consent of the Board of Agriculture (see INCLOSURE ACTS); and chapter ix. declares those to be bastards who are born before the marriage of their parents.

Mesne Lord—A lord holding of a superior lord.

Mesne Process—Intermediate process which issues pending the suit upon some collateral interlocutory matter. Arrest on mesne process, formerly allowed in a number of cases, is now greatly restricted,

by the provisions of the Debtors Act, 1869. See DEBTORS ACT; FINAL PROCESS; ORIGINAL PROCESS.

Mesne Profits.—See RECOVERY OF LAND.

Message—A written communication of facts or views sent by the chief magistrate of a republic to its legislature, the equivalent more or less of our Queen's Speech; sometimes also used to describe communications to their Parliaments by crowned heads.

Messenger.—See QUEEN'S MESSENGER.

Messuage—A dwelling-house with offices, etc.; the word is allied to O. F. "masage," a tenement, and is derived from O. F. "mas," answering to English "manse" (Skeat, *Ety. Dict.*). "By the grant of a messuage, or house, *mesuagium*, the orchard, garden, and curtilage do pass; and so an acre or more may pass by the name of a house" (*Co. Litt.* 5 *b*). In some of the older cases it was suggested that "messuage" was a term of wider import than "house," but later cases have not approved of this view. In *Doe d. Clements* v. *Collins*, 1788, 2 T. R. 498, Ashhurst, J., said, "The distinction between 'house' and 'messuage' seems too subtle to be relied on at this time; for I think that whatever would pass by the one would equally pass by the other." By the grant of a "messuage," it is said, land other than a homestead or orchard would not now be held to pass, though contiguous to or enjoyed with it (1 Jarman, *Wills*, 5th ed., 735).

Metage Dues.—The Corporation of the City of London claimed from time immemorial the right to measure grain of all kinds, and various other kinds of merchandise, brought into the port of London, and to charge metage dues thereon; but by the Metage on Grain (Port of London) Act, 1872, compulsory metage dues on grain were abolished, but a duty at the rate of three-sixteenths of a penny per hundredweight was imposed in respect of all grains brought into the port of London for sale, such duty to cease entirely at the expiry of thirty years after 31st October 1872. This duty is only chargeable in respect of grain brought into the port for sale as grain, and not in respect of grain which, after importation, is dealt with in such a manner as to change its character and name in a commercial sense (*Cotton* v. *Vogan*, 1895, 65 L. J. Q. B. 40).

Metal.—"The word 'metals,' taken in its ordinary sense, does not include the precious metals" (per Parke, J., in *Casher* v. *Holmes*, 1831, 2 Barn. & Adol. 597). In that case it was held, on the construction of a local Act imposing duties on the importation of copper, brass, pewter, tin, and on "all other metals not enumerated," that duty was not payable on gold and silver. The word "metal" is of less extensive meaning than "minerals." (See MacSwinney, *Mines*, 2nd ed., p. 19.)

Metalliferous Mines.—See MINES AND MINERALS.

Metayer System—A system of farming, common in certain continental countries, under which the produce of the land is divided in definite proportions, frequently in equal shares, between the farmer and the proprietor of the land. The latter usually provides part, and sometimes the whole, of the stock necessary for cultivating the farm.

Metecorn was a measure or portion of corn given by the lord to some customary tenants as a reward for their labour (Cowel, *Law Dict.*).

Metegavel—A rent paid in victuals (Cowel, *Law Dict.*).

Meter.—See GAS.

Methylated Spirits.—See SPIRITS, METHYLATED.

Metric System—A system of weights and measures, first adopted in France and afterwards in other countries, in which the unit is multiplied or divided according to a uniform decimal notation. The use of this system was first authorised in this country in 1864, and a further statute on the subject was passed in 1897—the Weights and Measures (Metric System) Act, 1897—authorising the use in trade of weights or measures of the system. See WEIGHTS AND MEASURES.

Metropolis.—This term is used in the Metropolis Local Management Acts to describe the area now included within the administrative county of London. See LONDON COUNTY. It has the same sense in the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125, s. 4), and the Metropolis Water Acts of 1871 (34 & 35 Vict. c. 113, s. 3), and the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 100).

The definition in the Water Act of 1852 is slightly different (15 & 16 Vict. c. 84, s. 29, Sched.). The Metropolis is a distinct area from the METROPOLITAN POLICE DISTRICT.

Metropolis Management Acts.—See LONDON COUNTY.

Metropolitan Commons.—Commons lying wholly or partly within the METROPOLITAN POLICE DISTRICT as it stood in 1866 (and it has not since been altered) do not fall within the scope of the Commons Act, 1876, nor of the General Inclosure Acts (see 1866, c. 122, s. 5; 1869, c. 107, s. 2; 1876, c. 56, s. 35), and cannot be enclosed or regulated under them. But such commons are dealt with under the Metropolitan Commons Acts, 1866 (29 & 30 Vict. c. 122), 1869 (32 & 33 Vict. c. 107), and 1878 (41 & 42 Vict. c. 71). The commons subject to these Acts include all land,

subject in 1866 to any rights of common or to be enclosed under the Inclosure Act, 1845 (see 1866, c. 122, s. 3; 1869, c. 107, s. 2). The Acts are distinct from those as to OPEN SPACES, and provide for the preparation and certification by the Board of Agriculture of schemes for the establishment of local management of manorial commons with a view to expending money on their drainage, levelling, and improvement, and the framing of by-laws and regulations for prevention of nuisances and to preserve order.

The procedure is as follows:—

A memorial, usually with a draft scheme annexed, is prepared and presented to the Board of Agriculture, who were in 1889 (c. 30, s. 2) substituted for the Land Commissioners—

(*a*) By the lord of the manor or any commoners (1866, s. 6).

(*b*) By any twelve or more ratepayers, inhabitants of the parish or parishes in which the common lies (1869, s. 3).

(*c*) By a local authority for the district into which any part of the common extends, *i.e.*—

(1) The London County Council, where the whole or part of the common is in the county of London (1866, c. 122, s. 6; 1888, c. 41, s. 40 (8)).

(2) The urban district council (including a town council), where the whole is without London, and the whole or part is in the urban district (1866, c. 122, s. 6, Sched. I; 1875, c. 55, s. 6; 1893–94, c. 73, s. 21).

(3) The parish council in cases not within (1) or (2) (1866, c. 122, s. 6, Sched. I; 1893–94, c. 73, s. 6).

The Board on receipt of the memorial prepare a scheme or adopt, with or without modification, the draft annexed, and submit it in print to the memorialists, the lord of the manor, and the local authority (1866, ss. 7–10); and after two months, if the scheme is to be proceeded with, hold a local inquiry (s. 11) by an officer of the Board. At the inquiry the officer takes and receives all evidence and information offered, and hears all suggestions or objections with reference to the draft scheme or the common, and makes a report thereon (1866, ss. 11, 12); on receipt thereof, the Board of Agriculture finally settle and approve and certify it under seal, and supply copies and publish abstracts of the scheme in its final form.

The following provisions are essential in any scheme under the Acts:—

1. It must state what rights, if any, are claimed by any person or class of persons affected by the scheme, such as the lord of the manor or commoners, and how far they are affected by the scheme, and whether to such extent the scheme is assented to by all or any of such persons (1866, s. 14).

2. It must not take away or injuriously affect without his consent any estate, interest, or right of a profitable or beneficial nature without providing compensation, and for its ascertainment in the event of difference, in the same manner as in the case of compulsory taking or injurious affecting under the LANDS CLAUSES ACTS.

This requisition does not in any way affect the power of the owners of rights in the common to convey, or the memorialists to take a conveyance of, interests, etc., affecting the common. Such conveyance, if by deed, with the approval of the Board of Agriculture, needs no licence in mortmain (1866, s. 31). Alienation of rights so acquired has in some cases been prevented by stipulation in the conveyance (*Telford* v. *Met. Board of Works*, 1872, L. R. 13 Eq. 574); and the Crown may, in aid of a scheme under the Act, vest manorial rights in the Board of Agriculture for transfer by warrant to grantees for the purposes of the scheme (1866, s. 32).

If the scheme or the Board decides on any estate, interest, or right in a

manner not satisfactory to the claimant, he can (1866, s. 16) have the decision reviewed by an action under sec. 56 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118).

The rights which have come into controversy and litigation under such schemes have not been numerous. In *Hoare* v. *Met. Board of Works*, 1874, L. R. 9 Q. B. 296, the word "right" was held to include a right to maintain an inn sign-post on Blackheath. In *A.-G.* v. *Amherst*, 1879 (Hunter, *Open Spaces*, p. 352), the lord of the manor was held entitled to take gravel from Hackney Downs. But highway authorities cannot now take gravel from such a common without the leave of justices (1876, c. 56, s. 20; *Hayes Common Conservators* v. *Bromley Urban District Council*, [1897] 1 Q. B. 321).

3. The scheme must contain a provision for the sale of printed copies at all times to any person at a reasonable price fixed in the scheme (1866, s. 19). An annual report of schemes certified is sent to Parliament (1866, s. 21); and the schemes are included in a Provisional Order Confirmation Bill, which is dealt with as a public Bill, unless opposed, in which case it is referred to and reported on by a Select Committee (s. 23), and the scheme does not become operative except by virtue of the Confirming Act (1866, s. 22). After confirmation a scheme may be amended after following the same procedure, including statutory confirmation, as was employed in its creation.

Expenses.—The expenses attendant on the preparation and confirmation of a scheme are payable by the memorialists (1866, s. 24), or may be paid by the local authority affected. The local authorities may contribute to the cost of executing the scheme when confirmed—in the case of a parish council, out of the poor rate; in the case of a district council, out of the district rate; in the case of the London County Council, out of the county rate.

COMMONS REGULATED UNDER THESE ACTS.

COMMONS.	METROPOLITAN COMMONS SUPPLEMENT ACT.	REGULATING BODY.
Acton	45 & 46 Vict. c. iv.	Acton District Council.
Banstead (*i.e.* Banstead Downs and Heath; Burgh Heath and Park Downs)	56 & 57 Vict. c. cvii.	"Banstead Commons Conservators."
Barnes	39 & 40 Vict. c. clvi.	Conservators.
Blackheath	34 & 35 Vict. c. lvii.	London County Council.
Bostall Heath	40 & 41 Vict. c. cci.	
Brook Green	1881 (44 & 45 Vict. c. xviii.).	London County Council.
Chiselhurst	1886 (49 & 50 Vict. c. xiv.).	Conservators.
	1888 (51 & 52 Vict. c. l.).	
Chiswick and Turnham Green	1882 (45 & 46 Vict. c. iv.).	London County Council.
Clapham	1877 (40 & 41 Vict. c. cci.).	London County Council.
Ealing	40 & 41 Vict. c. cci.	Ealing District Council.
Eelbrook	44 & 45 Vict. c. xviii.	London County Council.
Farnborough (Kent)	51 & 52 Vict. c. xxxi.	Conservators.
Hackney Downs	1872 (35 & 36 Vict. c. xliii.).	London County Council.
	1881 (44 & 45 Vict. c. cxlviii.).	London County Council.
	1884 (47 & 48 Vict. c. ccxxiii.).	London County Council.
Hampstead Heath	34 & 35 Vict. c. lxxvii.	London County Council.
Hayes	1869 (32 & 33 Vict. c. lix.).	Conservators.
King's Road Wastes	44 & 45 Vict. c. xviii.	
Mitcham	54 & 55 Vict. c. xxvi.	Conservators.
Orpington	56 & 57 Vict. c. xxxix.	Conservators.
	44 & 45 Vict. c. xviii.	

Commons.	Metropolitan Commons Supplement Act.	Regulating Body.
Parson's Green . . .	41 & 42 Vict. c. cxlv.	London County Council.
Plumstead and Shoulder of Mutton Green	47 & 48 Vict. c. ccxxiii	London County Council.
Putney	34 & 35 Vict. c. cciv.	Conservators.
St. Paul's Cray . . .	51 & 52 Vict. c. l.	Conservators.
Shepherd's Bush . .	34 & 35 Vict. c. lxiii.	London County Council.
Staines	43 & 44 Vict. c. xxxvii.	Staines District Council.
Streatham . . .	47 & 48 Vict. c. ii.	London County Council.
Tooting Beck . . .	36 & 37 Vict. c. lxxxvi.	London County Council.
Tooting Graveney . .	38 & 39 Vict. c. clxxix.	London County Council.
Tottenham . . .	45 & 46 Vict. c. iv.	Tottenham District Council.
Wandsworth . . .	34 & 35 Vict. c. clxxxi.	Conservators.
Wimbledon . . .	34 & 35 Vict. c. cciv.	Conservators.

Unless and until the procedure of the Acts is adopted, the lord, while unable to enclose under the Act of 1876 or the Inclosure Acts, could extinguish by purchase from the commoners all rights in the waste (*Robertson* v. *Hartopp*, 1890, 43 Ch. D. 484). But with a view to prevent this proceeding, the London County Council can buy up any saleable rights of common, or any tenement of a commoner having rights of common annexed (see 1876, c. 56, s. 8; 1878, c. 71, s. 2). The lord's right to enclose under the Statutes of Merton and Westminster the Second is fettered by the Commons Act, 1893 (56 & 57 Vict. c. 57), and secs. 8 (4), 26 (2) of the Local Government Act, 1894.

Remaining Rights of Lords and Commoners.—Even in the case of metropolitan commons, the provisions of secs. 30, 31 of the Commons Act, 1876, apply, whereby a summary remedy is given in the County Court in the case of illegal enclosures or encroachments, and three months' notice of any intention to enclose or approve a common must be put in the local papers. But this does not apply where all rights of common are vested solely in the lord of the manor (41 & 42 Vict. c. 71, s. 3).

By-laws and Regulations.—The schemes usually empower the making of by-laws and regulations, the validity whereof may be tested like that of any other by-law. One prohibiting public meetings without licence of the regulating authority is valid (*De Morgan* v. *Met. Board of Works*, 1880, 5 Q. B. D. 155). As to commons under the control of the London County Council, further power to make by-laws is given by the London Council General Powers Act, 1890 (53 & 54 Vict. c. ccxliii. ss. 14–19, Schedule), in addition to that given by a prior Act of 1877 as to certain commons there named (40 Vict. c. viii. s. 4).

[*Authorities.*—Hunter on *Open Spaces, etc.*; Hunt, *London Local Government*, vol. ii. p. 1082.]

Metropolitan Inclosures Acts.—See Metropolitan Commons.

Metropolitan Police District.—This district was formed in 1829 (10 Geo. IV. c. 44) with the object of substituting an efficient police force for the ancient and useless system of common law constables and watchmen.

Area.—The district does not include London City (2 & 3 Vict. c. 47, s. 1), but includes London County, and any part of any parish or place within 15 miles of Charing Cross which Her Majesty, with the advice of

the Privy Council, may be pleased to include (10 Geo. IV. c. 44, ss. 4, 34, 35; 2 & 3 Vict. c. 47, s. 2; 51 & 52 Vict. c. 41, s. 40). An Order in Council was made under these powers on January 3, 1840 (4 St. R. & O., Revised, p. 1201), including parishes in Middlesex, Surrey, Kent, Essex, and Herts. But the area is not the same as that of the district of the CENTRAL CRIMINAL COURT. It was extended to Trafalgar Square in 1844 (7 & 8 Vict. c. 60).

Police.—A separate police force was formed for the district, which is not under the control of the ordinary justices of any of the counties in the district, nor of any county or borough council, but is under the Commissioners of Police for the Metropolis.

A chief commissioner of police and three assistant commissioners are appointed by the Crown by warrant under the sign manual as justices of the peace for London, Middlesex, Hertford, Kent, Surrey, Essex, Berks, and Bucks (10 Geo. IV. c. 44, s. 1; 2 & 3 Vict. c. 47, s. 4; 19 & 20 Vict. c. 2, s. 2; 47 & 48 Vict. c. 17, s. 2), and on the Thames flowing through those counties (57 & 58 Vict. c. clxxxvii. ss. 284, 285).

They have an office in Westminster (now New Scotland Yard). They do not take any part in the ordinary judicial or administrative work of justices of the counties over which they have authority, *i.e.* they must not act at general quarter or special sessions, but only for the preservation of the peace, the prevention of crimes, the detection and committal of offenders, and carrying out the Metropolitan Police Acts. They have power to issue warrants with respect to betting and gaming houses, and in certain cases for search for stolen goods (34 & 35 Vict. c. 112). The chief commissioner, besides his general powers under the Police Acts, is the authority to license chimney-sweepers (1875, c. 70, s. 5), hackney and stage carriages and drivers (1853, c. 33, ss. 2, 12, 16), pedlars (1871, c. 96), and to make regulations as to Dogs not under proper control (1871, c. 56, s. 5).

The constables are enrolled by the commissioners under the authority of, and to a number approved of by, a Secretary of State. The commissioner can swear in constables of the force for the royal palaces, and for royal dockyards and military stations, even outside the district (1839, c. 47, s. 7).

The constables of the force have all the powers and privileges of a constable at common law or by statute in the counties of London, Middlesex, Surrey, Kent, Essex, Berks, and Bucks (10 Geo. IV. c. 44, s. 4; 2 & 3 Vict. c. 47, s. 5), and upon the Thames within and adjoining to the city of London and its liberties, and the creeks, inlets, and waters, docks, wharves and quays, and landing-places thereto adjacent, and have superseded the horse patrol and old Thames police, which have ceased to exist as an independent body. They can also execute in any part of England, without indorsement, a warrant issued by a metropolitan police magistrate; and within the district they alone may serve or execute warrants issued in a criminal proceeding within the district, or by a magistrate within the district (2 & 3 Vict. c. 47, ss. 11–13).

The discipline of the force is controlled, subject to the Home Office, by the chief commissioner, who, with the assent of a Secretary of State, may issue police orders and regulations.

The traffic in the streets of the county of London is controlled by the commissioner under the Metropolitan Streets Acts of 1867. They have also powers to regulate traffic on the Thames on occasions like boat races.

The expenses of the police are met by a police rate not exceeding 9d. in the £, levied over the whole district, and are controlled by the receiver of police appointed by the Crown (1829, c. 44, ss. 10, 28), who is the treasurer and financial manager of all expenditure. He also has to

deal with claims for damage by riot within the district (1886, c. 38), and in him is vested all property held in connection with the force and the Courts (1829, c. 44, s. 16; 1897, c. 26, s. 3).

The expenses now include the construction and maintenance of police courts, offices, and stations, and of the officers attached, except the magistrates (1897, c. 26, s. 1). But they do not include the salaries of the chief commissioner and two of the assistant commissioners, or the receiver, or the police magistrates; or the expenses of the police in dockyards or military stations, which are all defrayed by Parliament (1839, c. 71, s. 9; 1856, c. 2; 1860, c. 135; 1871, c. 39), which also makes a contribution to the police fund for expenses and superannuation out of the LOCAL TAXATION GRANT.

Property taken by the police with reference to an offence is now dealt with under the Police Property Act, 1897 (c. 30).

Magistrates.—The Crown may appoint not more than twenty-seven magistrates for the district from practising barristers of at least seven years' standing, or stipendiary magistrates from other parts of England and Wales. They become by appointment, and without qualification by estate, justices for the counties of London, Middlesex, Kent, Surrey, Essex, and Herts. The chief magistrate is also a justice for Berks, which enables him to attend Ascot Races, and to hold a Court for indictable offences there committed (1848, c. 12, s. 31). They can appoint deputies with the approval of the Home Secretary (1867, c. 34, s. 2).

Police Courts have been established for that part of the district lying within the county of London; but the Police Court divisions do not quite include the whole county, and in certain cases extend outside it. A magistrate must attend daily at each Court. Each magistrate at such a Court has all the powers of two justices as a Court of summary jurisdiction, or to inquire into indictable offences, and, within the Court divisions, exclusive power to proceed for offences under the Police Acts, a series of minor offences which correspond closely but not absolutely with those under the Towns Police Clauses Acts. The magistrates cannot sit as justices in Quarter Sessions. See MAGISTRATE.

The whole of the law and practice within the district is collected in the *Official Metropolitan Police Guide*, 2nd ed., 1896, ed. by Archibald.

Metropolitan Vestries.—1. *Formation and Constitution.*—Vestries in the metropolis outside the City are (subject to the statutory modifications hereinafter noted) governed by the Metropolis Management Acts, 1855 to 1890. The first of these (18 & 19 Vict. c. 120, 1855) repealed the provisions of "Sir John Hobhouse's Act" (1 & 2 Will. IV. c. 60, 1831, establishing elected vestries in place of vestries at which all ratepaying parishioners had a right to be present (see VESTRY)) so far as regarded any parish mentioned in Scheds. A and B to the Act, and made provision for the election of vestries or District Boards in such parishes. By sec. 2 it is provided that the vestry of every parish mentioned in these schedules shall consist of 18 members if the number of rated householders does not exceed 1000, with 6 additional vestrymen if the parish contains more than 1000 householders, 12 if it contain more than 2000, and so on at the proportion of 12 additional vestrymen for every 1000 householders till a maximum of 120 vestrymen is reached. Sec. 3 provides that every parish containing more than 2000 householders shall be divided into wards, no ward containing less than 500 rated householders. The apportionment among the wards

of the vestrymen elected for the parish was left to the persons appointed under the Act, but the Metropolitan Board of Works, which the Act created, was given power to alter it if the number of inhabited houses in the wards changed; and this power is now, by the Local Government Act, 1888, vested in the London County Council, which has also power to rearrange the number and boundaries of wards in a parish, so long as each contains not less than 500 rated householders, and subject to the approval of a Secretary of State (London County Council (General Powers) Act, 1893, 56 & 57 Vict. c. 221, modified by 58 & 59 Vict. c. 127, s. 42, 1895). A vestryman elected for more than one ward must choose which he will represent (s. 39 of 1862 Act). The election of vestrymen is (s. 7 of 1855 Act) to take place annually in May, and all members elected go out of office (s. 9) at the annual election in the third following year, except such members as are elected to supply vacancies occasioned otherwise than by effluxion of time, who go out of office when the term of office of their predecessors would have expired. The incumbent and churchwardens of each parish in the schedules constitute (s. 2) a part of the vestry, and vote therein in addition to the elected vestrymen, also every district rector constituting in the parish a part of the vestry when the Act passed. Sec. 11 provides for the election of auditors from among the ratepayers of the parish who have signified in writing their willingness to serve, such auditors to be five in number in a parish not divided into wards, and, in a parish so divided, one for each ward, but not more than five altogether. Auditors must be persons eligible for election as vestrymen, but not actually vestrymen; and they go out of office at the vestry election in the year next following their election (s. 12). A quorum of the vestry is to be 5 in a vestry of not more than 18, 7 in one of 24, 9 in one of 36 and upwards; and all questions are to be decided by the majority (s. 28). This must be a majority of those *present*, not only of those voting (*In re Eynsham*, 1849, 12 Q. B. 398; *R.* v. *Christchurch*, 1857, 27 L. J. M. C. 23; neither case, however, having been decided under the 1855 Act). If the vestry-room of the parish is too small for any vestry meeting, such meeting is to be held elsewhere within the parish, but not in the church or chapel thereof (s. 29). Sec. 30 provides that in the absence from a vestry meeting of the person authorised by law to take the chair, the members present shall, before proceeding to other business, elect a chairman for the occasion, who shall have a casting vote in case of an equality of votes on any question; and by sec. 31 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), it is enacted that every vestry shall, at its first meeting after the annual election of members, elect a chairman for the year. The next sections of the Act relate to the election of District Boards, consisting of the Metropolitan vestries mentioned in Sched. B to the Act, and united in the groups and with the representation there mentioned. By sec. 33 the Metropolitan Board of Works (now the London County Council) may, upon a census showing that the relative numbers of inhabited houses in the parishes of a district have varied, alter the representation, but the number of members for a parish, if it exceed three, must be divisible by three. The provisions for the term of office of members of District Boards are similar to those in the case of vestries, but its provisions relating to annual elections are repealed by sec. 40 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), which orders an election by the vestries on the first Wednesday in June of each year. The vestries also (s. 37 of 1855 Act) elect to casual vacancies. Seven is the quorum for a District Board (s. 38). As to the meaning of "majority," see *supra*. Chairmen of

District Boards are elected under the same provisions as those of vestries. Both vestries and District Boards may hold their meetings at such times as they appoint, notwithstanding anything to the contrary in a local and personal Act (Metropolis Management Act, 1862, s. 37; Local Government Act, 1894, s. 31 (3)). Special meetings of District Boards may be convened by five members or by the clerk on their requisition (s. 40), the notice specifying the object (see *R.* v. *Powell*, 1873, L. R. 8 Q. B. 403). By sec. 42 of the 1855 Act District Boards and vestries are constituted bodies corporate. The provisions of the 1855 Act relating to the qualifications of vestrymen and their electors and the members of District Boards are repealed by the Local Government Act, 1894, sec. 31 of which provides that the provisions of the Act shall apply as if vestrymen and auditors, and, so far as relates to their qualification, members of District Boards, were urban district councillors; and no one is *ex officio* to be a chairman of such vestries. Sec. 48 of the 1894 Act directs that rules framed by the Local Government Board in relation to elections shall have effect as if enacted in the Act; and such rules were issued in the Vestrymen and Auditors (London) Election Order, 1897, which prescribes at great length and in elaborate detail the method of holding elections for vestrymen and auditors. By sec. 31 (1) of the Act the Election (Hours of Poll) Act, 1885, is to apply to vestry elections, *i.e.* the poll is to be open from 8 a.m. to 8 p.m.; the application of the provisions relating to urban District Councils means that the electors are the "parochial electors," *i.e.* the persons on the Local Government register or the parliamentary register of electors (s. 2 of 1894 Act), and married women are not excluded (s. 43), though they and their husbands cannot be qualified in respect of the same property, and ownership, as distinct from occupation, does not confer the right to vote (*Drax* v. *Ffooks*, [1896] 1 Q. B. 238). Each elector may give one vote and no more for each of any number of persons not exceeding the number to be elected (s. 23), and by the same section, applied by sec. 31, auditors, vestrymen, and members of District Boards must be parochial electors of some parish in the district, or have been, during the whole of the twelve months preceding the election, resident in the district. By sec. 46 (1) the disqualifications for election are the being an infant or an alien, receipt of parish relief within twelve months before or since the election, imprisonment with hard labour or greater punishment, without a pardon, and without the option of a fine, bankruptcy or composition with creditors within five years before or since it, holding a paid office under the vestry, or being concerned in a bargain or contract with it, or participation in the profits thereof; but no one is disqualified by being interested in the sale or lease of lands or loan of money to the vestry or Board, or the supplying or transport of materials for the making or repairing of highways or bridges, or a newspaper in which the vestry or Board advertises, or in a contract with it, as a shareholder in any joint-stock company, provided that he must not vote at a meeting on any question in which his company are interested, though the County Council may remove this prohibition in the case of a water or other public works company (s. 46 (2)). The disqualification of bankruptcy or composition ceases on the annulment of the adjudication, or discharge with a certificate that the bankruptcy was caused by misfortune without misconduct, or payment of debts in full; absence for more than six consecutive calendar months vacates a seat, unless it be due to illness or other approved reason, and the office is forthwith to be declared vacant, and every disqualified person who acts or votes is liable to a fine not exceeding £20 (s. 46 (4) to (9)). For

cases on the disqualifications of bankruptcy and bargain or contract, see article MUNICIPAL CORPORATIONS.

A vestryman has to make a declaration of acceptance of office; and, unless disabled by infirmity, etc., or claiming exemption within ten days of re-election, or nominated without his consent, he is liable to a fine not exceeding £50 if he declines it. He may resign for the same fine, and, unless disqualified, is always eligible for re-election when his term of office ceases (1897 Order, Sched. 3, adopting provisions of the Municipal Corporations Act, 1882). Resolutions or other acts of District Boards and vestries can only be revoked or altered by a two-thirds majority at a subsequent meeting, unless the attendance at the latter be one-fifth greater than at the former meeting (1855 Act, s. 57), and the subsequent meeting must be specially convened. They may appoint committees, who have power to transact business as they think proper, with a quorum of three (ss. 58, 59), and minute-books are to be kept open to the free inspection of every owner of property, churchwarden, overseer, ratepayer, and creditor on the rates, who may also take free copies (ss. 60, 61). They may appoint and remove officers and servants; the clerk and treasurer are not to be the same person, and no officer, under a penalty of £50, may be interested in a contract (except as a shareholder) with the Board or vestry, or take any reward or fee other than his salary. An officer or servant to whom money will be intrusted must give security. Offices are to be maintained, and some clerk or other person must attend daily, except on Sundays, Christmas Day, Good Friday, and days of public fast or thanksgiving (ss. 62–66).

2. *Duties and Powers.*—By the 1855 Act all sewers outside the City (except main sewers) are vested in the vestries and District Boards, who are to repair them, and from time to time construct new ones. They have a discretion as to this (*R.* v. *Vestry of Chelsea*, 1862, 31 L. J. Q. B. 50), and a *mandamus* cannot be obtained against a local authority for improper use of powers or performance of duty with regard to drainage (*Peebles* v. *Oswaldtwistle District Council*, [1897] 1 Q. B. 625); but their powers are subject to the control and by-laws of the County Council (as representing the old Metropolitan Board of Works, see ss. 45–51 and 83 of the Metropolis Management Act, 1862, and Metropolis Management Amendment Act, 1890, s. 4). A vestry or District Board may transfer their powers as to sewerage to the County Council, with the latter's written consent (1855 Act, s. 89; 1862 Act, s. 28). Where any party is liable to repair sewers, etc., they may divide the expense between themselves and the parish (s. 70 of 1855 Act); and by sec. 73 vestries and District Boards may compel owners, etc., of houses to drain into the common sewer. The subsequent sections of the Act down to sec. 88 contain elaborate provisions as to the mode in which these powers may be exercised. Secs. 90–94 deal with the transfer to the vestries and Boards of existing powers of paving, lighting, etc., but not in regard to baths and washhouses, burials, or markets; sec. 96 transfers to them highways (included in "street," s. 250); by sec. 98 they are to cause streets to be paved, and secs. 99–116 deal with their powers in regard to paving, etc., done by private owners, the taking up of pavements to place gas and water pipes, and the watering of streets. By sec. 118 they may appoint and pay crossing-sweepers, and by secs. 119–123 direct and control the removal of projections, etc., and the erection of hoardings. They are to cause streets to be lighted (s. 130), and this duty may be enforced by *mandamus* (*R.* v. *Lambeth Vestry*, 1862, 31 L. J. Q. B. 252). They are the sanitary authority for the execution of the Public Health (London) Act,

1891 (54 & 55 Vict. c. 76, s. 99), and thus appoint medical officers of health, inspectors of nuisances, etc. They may enter into contracts (sealed with their seal, if for materials exceeding £10 in value), purchase lands (but not compulsorily, and the owners may reserve a right of pre-emption; see, however, "Michaelangelo Taylor's Act," referred to, *post*, ss. 80–82), and sell lands (1855 Act, ss. 149–155). Secs. 158 *sqq.* deal with the levying of rates to defray the expenses of the vestries and Boards in executing the Act; and secs. 171 *sqq.* (with sec. 5 of the 1862 Act) with the precepts of the Metropolitan Board of Works (now the County Council) for raising the necessary sums for County Council purposes (but the precepts of the London County Council are issued to the guardians). Sec. 183 gives District Boards and vestries power to borrow and mortgage the rates as security; Schedules E and F to the Act giving forms of mortgage and transfer of mortgage, and secs. 185–191 dealing with the keeping of registers of mortgages and transfers, repayment, interest, appointment of receiver, and sinking fund, for which last not less than 2 per cent. on the principal secured is to be annually set aside out of the moneys or rates charged. By sec. 192 the accounts are to be annually balanced in April; by sec. 194 District Boards are to annually elect three auditors from among the auditors of the parishes in the district; and in May the auditors are to audit the accounts in the presence of such members, ratepayers, and creditors on the rates as desire to attend (s. 195). An abstract of accounts is then to be prepared (s. 196) and published in June (s. 198), and once a year at least there is to be published a list of the estates and charities under the control of the vestry Boards; and vestries may make, alter, and repeal by-laws as to their own proceedings, and for the regulation of new streets, sewers, etc., and impose penalties for the breach of them, and by-laws are to be hung up in the office for free public inspection (ss. 202, 203). Secs. 204–210 impose penalties for damage to the property and works of vestries and Boards.

There is an appeal from an order of a vestry or Board to the London County Council (s. 211). Where any payment is to be made by private parties, it may be spread over twenty years (s. 216). For the mode of recovering expenses from owners, see secs. 96, 97 of the 1862 Act; penalties, damages, and costs (s. 227 of 1855 Act; 104 of 1862 Act) are to be recovered by summary proceedings before a justice; and an offender against the Act or a by-law made in pursuance of it, if his name and residence are unknown, may be seized and carried without warrant before a justice by an officer or servant or police constable (s. 229). Proceedings are not to be quashed for want of form, or removed by *certiorari* into a superior Court (s. 230), but *secus* if there be no jurisdiction (see *Ex parte Bradlaugh*, 1879, 3 Q. B. D. 509). Vestries acting in union at the time of the Act may continue to do so, and guardians, etc., then elected by law for the vestry may still be so elected (s. 235). Gardens, etc., vested in commissioners are to remain so vested, subject to elections of committees where the neighbouring inhabitants are assessed for their maintenance, and necessary sums are to be raised by the vestry (s. 239; and see *R.* v. *St. George's, Hanover Square*, 1863, 32 L. J. Q. B. 160). The Commissioners of Sewers are to retain control and property in regard to such parts of parishes as are in the city of London (s. 242). By sec. 1 of the Metropolis Management Act, 1856 (19 & 20 Vict. c. 112), the power of raising church rates is to remain in the open vestry, and not be transferred to the statutory vestry; and by sec. 2 ecclesiastical districts and elections of churchwardens remain unaffected by these Acts. But (s. 3) all other duties and powers and privileges, including such as relate to the affairs of the

church (but not a right of presentation—*Carter* v. *Cropley*, 1857, 26 L. J. Ch. 246), or to the administration of any money or other property applicable to the relief of the poor, are transferred; it has been held that this transfers powers of levying poor rates and appointing governors, conferred by local Acts, and of appointing new trustees of a charity (*Vaughan* v. *Imray*, 1859, 28 L. J. M. C. 78; *R.* v. *Rendle*, 1861, *ibid.* 30, 135; *In re Hazle*, 1862, 31 L. J. Ch. 612), but not a right of electing almspeople (*A.-G.* v. *Drapers' Co.*, 1858, 27 L. J. Ch. 542). Meetings of vestries may be convened by notice sent through the post or otherwise (s. 9). A vestry or local board may acquire open spaces and defray the cost out of the funds at their disposal or which they raise (Metropolis Open Spaces Act, 1881, 44 & 45 Vict. c. 34). By sec. 19 of the Act of 1862 (25 & 26 Vict. c. 102) no person lending money to a vestry or District Board is bound to inquire into the application of it, and by sec. 20 the Public Loans Commissioners may advance money to them (see also 38 & 39 Vict. c. 89, 1875, and amending Acts). By sec. 38 questions relating to allowances, disallowances, or surcharges in auditor's accounts may be removed into the Queen's Bench Division by *certiorari*. In secs. 45 *sqq.* are contained further provisions respecting sewerage, and sec. 72 empowers vestries and District Boards with the consent of the London County Council, to effect improvements in their parishes and districts (by sec. 100 they may borrow for this), and sec. 73 extends to the Metropolis "Michaelangelo Taylor's Act" for this purpose (57 Geo. III. c. 29). By sec. 77 adjoining owners (*i.e.* persons receiving rack-rent, s. 250 of 1855 Act) are to contribute towards the paving of new streets (see as to what is a new street, the definition in sec. 112, and *Vestry of Battersea* v. *Palmer*, [1897] 1 Q. B. 220; *Arter* v. *Hammersmith Vestry*, *ibid.* 646), and secs. 80–84 relate to the effecting of such works. By sec. 86 the County Council may place roadways, footpaths, etc., in different parishes or districts under one vestry or Board. The first Metropolis Management Act, 1890 (53 & 54 Vict. c. 54), enables vestries and Boards to flag footpaths, and recover the expense from the adjoining owners, and see also secs. 2, 3; by the second Act of 1890 (c. 66) they may (s. 3) repair roads or ways, not being streets; and by sec. 6 no subsoil under a street, road, passage, or way may be renewed without the consent of the vestry or Board, subject to an appeal to the County Council. Since 1855 the District Boards of Westminster, Fulham, Plumstead, and Hackney have been dissolved by Acts passed respectively in 1887 (50 & 51 Vict. c. 17), 1885 (48 & 49 Vict. c. 33), and 1893 (56 & 57 Vict. c. 55), and in their place have been created the vestries of Westminster, Hackney and Stoke Newington, Fulham and Hammersmith, and Plumstead, and the London County Council district. By the first above-mentioned Act Battersea also was constituted a separate vestry; and as to Woolwich, see sec. 238 of the 1855 Act, and secs. 99 and 102 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to the Inns of Court and other places in Sched. C to the 1855 Act, see secs. 175–179, sec. 12 of 1862 Act, and 32 & 33 Vict. c. 102, s. 25. The short title of "Metropolis Management Act" is authorised by the Short Titles Act, 1896 (59 & 60 Vict. c. 14). See also articles LONDON CITY; PUBLIC HEALTH; RATING; SEWERS; VESTRY; ALLOTMENTS.

[*Authorities.*—Hunt, *London Local Government*, 1897; Prideaux, *Churchwarden's Guide*, 16th ed., 1895.]

Meuble; Moveable—A term corresponding in Continental law to "personal property" in English law. "All property," says the

French Civil Code, "is either moveable or immoveable" (Art. 517). See IMMEUBLE.

Bodies which can move from one place to another, whether by themselves, as animals, or without the assistance of extraneous power, as inanimate things, are moveable property by nature (Art. 528). Bonds and shares relating to sums due or to moveable objects, shares or interests in financial, commercial, or manufacturing companies, even if immoveable property is owned by the companies in connection with these enterprises, are moveable property by determination of law. Such shares or interests are considered moveable property only with respect to each shareholder so long as the company lasts. Perpetual or life annuities, whether paid by Government or by private individuals, are moveable property by determination of law (Art. 529).

Michaelangelo Taylor's Act.—See LONDON COUNTY.

Michaelmas—The Feast of the Archangel Michael and All Angels, observed on the 29th of September, and in the Church of England by proper lessons, collect, epistle, and gospel. It is also one of the customary quarter days, and gives its name to the autumn sittings of the High Court of Justice, though these do not commence till 24th October, as before the Judicature Act of 1873 it did to the autumn term of the legal year.

Middlesex.—The ancient county of Middlesex was in 1888 truncated by the complete severance from it of the urban districts on the north bank of the Thames, transferred to the new LONDON COUNTY. The remainder of the county continues to exist as a separate county for administrative purposes; and it retains as to its now limited area its commission of the peace and its Court of Quarter Sessions, which, under the provisions of sec. 42 (12) of the Local Government Act, 1888, is still held at the sessions house in Westminster, till 1888 a liberty of the old county. The special statutes relating to Middlesex Sessions, except as to fixing justices' clerks' fees (12 Geo. II. c. 29, s. 20), have ceased to apply to Middlesex since 1889, and were wholly repealed on the retirement of the last assistant judge appointed under them (1888, c. 41, s. 42 (11)), and the present sessions are presided over by an unpaid chairman and deputy chairman. The petty sessional divisions are regulated as in other counties, subject to the transitory provisions of sec. 42 (9) of the Local Government Act, 1888.

For purposes of assizes and civil business in the High Court, Middlesex and London are treated as one county. See LONDON COUNTY.

Middlesex, until 1888, had no sheriff of its own, the sheriffdom having at an early date been let to farm to the city of London, by whose elective sheriffs the duties of sheriff were discharged. It has now a sheriff of its own, selected by the Crown (1888, c. 41, ss. 46 (6), 113).

The police of Middlesex are those of the METROPOLITAN POLICE DISTRICT. See 51 & 52 Vict. c. 41, s. 93 (1).

The records of the old undivided county have been retained by the council of the smaller administrative county, in spite of protests and claims from the county of London.

The powers of the Middlesex County Council are the same as those of any other County Council, except that of London; but they possess a special Act (57 & 58 Vict. c. 15) with reference to the licensing of places of public entertainment.

The freeholders of the county of London retain their right to vote at

parliamentary elections in the truncated county of Middlesex (1888, c. 41, s. 92), and the old area of the county continues for the purpose of the registry of deeds. See LAND REGISTRY; LAND TRANSFER; REGISTRATION OF DEEDS.

Middlesex Registry—The machinery for the registration of memorials of conveyances of property situate in the county of Middlesex, exclusive of the city of London. For full particulars, see REGISTRATION OF DEEDS.

Middle Temple.—See INNS OF COURT.

Midsummer Day—The 24th of June; the Nativity of St. John Baptist. Midsummer day is one of the four usual quarter days in England. See QUARTER DAYS.

Mileage—A fee or allowance of a certain sum per mile for travelling expenses allowed to sheriff's officers and others according to certain settled scales.

Mileage Rate—A rate of a certain sum per mile charged by railway and canal companies for the conveyance of traffic over their undertakings. See CANAL; RAILWAY; RAILWAY AND CANAL COMMISSION.

Milestones.—Highway authorities are empowered to maintain, replace, or set up milestones on highways, the expenses incurred being a lawful charge upon the highway rate (Highway Rate Assessment and Expenditure Act, 1882, s. 6). Pulling down, destroying, obliterating, or defacing any milestone is an offence punishable by fine not exceeding forty shillings, and the offender may further be ordered to pay damages in respect of the same (Highway Act, 1835, s. 72).

By the Railways Clauses Act, 1845, s. 94, railway companies are required to set up "milestones, posts, or other conspicuous objects . . . at the distance of one-quarter of a mile from each other, with numbers or marks inscribed thereon denoting such distances." A penalty of £5 is imposed on persons injuring or defacing such milestones (s. 95).

Military Acts.—See ARMY.

Military and Naval Pay and Pensions.—See PAY AND PENSIONS, MILITARY AND NAVAL.

Military Courts—Courts which administer military law, whether in the army or navy; they are usually termed courts-martial (*q.v.*). See articles ARMY; EARL MARSHAL; COURT OF; JUDGE ADVOCATE-

GENERAL; MARTIAL LAW; MILITARY LAW; NAVY; MILITARY COURTS OF INQUIRY.

Military Courts of Inquiry.—By virtue of its prerogative the Crown may direct Commissions, or Courts of Inquiry, to examine into the truth of allegations, and report on matters connected with the administration, or the government in matters of discipline, of the army, or of other forces under military law. These Courts sit both in military and in naval matters under rules of procedure which are on the whole similar, but which differ in certain respects. In several instances the exercise of the prerogative is subject to legislative enactment, as, *e.g.*, under the Regimental Debts Act, 1893 (56 Vict. c. 5) (REGIMENTAL DEBTS); or under sec. 72 (*infra*) of the Army Act, 1881 (44 & 45 Vict. c. 58).

They are not, strictly speaking, Courts, since they possess no power of deciding judicially upon matters examined into by them; they sit usually in secret; they have no power of compelling civil witnesses to attend; and they cannot take evidence on oath except by statutory authority. They are assemblies of persons directed to make inquiries into matters of administration or discipline, either for the information of Ministers of the Crown, or of any officer in command of troops, to assist them in arriving at correct conclusions on any subject on which it may be expedient for them to be informed. Committees and Boards are Courts of Inquiry, and differ from them only to this extent, that the objects for which they are assembled do not involve points of discipline.

In relation to military procedure in matters of discipline, they have been compared to the Grand Jury in civil proceedings, or to the preliminary magisterial inquiries in criminal cases, where, if there is no case, the accused is discharged at once, or, otherwise, committed for trial. But they differ from both in many material respects. For example, in addition to other differences already pointed out, they give no opinion on the conduct of any officer or soldier; and the proceedings of a Court of Inquiry, or any confession, statement, or answer to a question made or given, are not admissible in evidence, if the matter comes before a court-martial; nor can any evidence respecting the proceedings at the inquiry be given at the court-martial.

But though these Courts are not strictly judicial tribunals, it has been decided in two ruling cases that the reports they make are privileged communications, and also that witnesses before them stand in the same position as witnesses giving evidence before a judicial tribunal. The first of these is *Home* v. *Lord F. C. Bentinck*, 1820, 2 B. & B. 130; 22 R. R. 748; the second, *Dawkins* v. *Lord Rokeby*, 1875, 7 L. R. H. L. 744. They were both actions of libel by officers, whose conduct had been brought into inquiry, against witnesses; and it was held in the first case that the officer, who had been summoned to produce at the trial of the action the report of the Court of Inquiry and the proceedings, was not bound, nor even at liberty, to disclose the documents in question, they being State documents, and protected, as such, from exposure in Courts of justice (see ACT OF STATE).

Under the above-mentioned sec. 72 of the Army Act, it is provided that when any soldier has been absent without leave for twenty-one days, a Court of Inquiry may, as soon as practicable, be summoned and inquire, in the manner prescribed by the rules of procedure or regulations made under the Act, and on oath or solemn declaration (which the Court is authorised to administer), respecting the facts of such absence, and the deficiency (if

any) in the arms, ammunition, etc., of the soldier. If satisfied of the fact of such absence without leave, or other sufficient cause, the Court is to declare such absence, and the period thereof, and the deficiency (if any), and the commanding officer of the absent soldier is to enter in the regimental book a record of the declaration of such Court. If the absent soldier does not afterwards surrender, or is not apprehended, such record is to have the legal effect of a conviction by court-martial for desertion.

By r. 130 of the Army Regulations (s. 6) a Court of Inquiry is to be held on every returned prisoner of war, to investigate the circumstances under which he was taken prisoner.

A similar provision is made in the case of militiamen, when subject to military law, by the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 28. Also in the case of men belonging to the army or militia reserve, when subject to military law, by the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 19.

In the navy a Court of Inquiry may be summoned by an officer in command of a squadron, or on detached service; and when an inquiry has been ordered by an officer in command, or by a commander-in-chief the proceedings of the Court are to be forwarded to the Admiralty with the opinion of the commander-in-chief.

In the army the proceedings are to be forwarded by the president to the commanding officer who assembled the Court: and the latter will, on his own responsibility, form such opinion as he thinks just.

See COURTS-MARTIAL.

[*Authorities.*—Clode, *Military Forces of the Crown*; Thring, *Criminal Law of the Navy; Manual of Military Law*, War Office, 1894.]

Military Custody; Military Prisoners; Military Prisons.—Military custody may mean either arrest or confinement of a person subject to military law pending charges to be brought against him, or, in certain cases of less serious offences, confinement in execution of the sentence; or in other cases it may mean detention after sentence until the person can be duly sent to a proper public civil or military prison, or penal servitude prison, in which the sentence is to be executed.

It is not an invariable rule that persons charged should be put under arrest or into confinement: but it is usual, except in trivial cases, and when court-martial is decided upon. Officers, commissioned and non-commissioned, are placed under arrest, which is either close or open; the former consisting of a prohibition from leaving quarters or tent; the latter, from going beyond certain fixed limits. But if the circumstances require it an officer may be placed in the charge of a guard, piquet, patrol, or sentry, or if on active service abroad, in custody of a provost-marshal (*q.v.*).

Private soldiers are confined pending charges, either in the prisoner's room of a barracks or the guard-room cells; and when in billets or on the line of march, or if accommodation for detention is not available, a soldier in military custody, while waiting trial, may be committed by his commanding officer for not exceeding seven days, to any civil prison or lock-up (Regulations, s. vi. par. 29).

Various provisions are made in the Army Act, 1881 (44 & 45 Vict. c. 58), relative to arrest and confinement pending charges; but most of the rules are laid down in the above-mentioned section of the Army Regulations.

Peers and members of the House of Commons are not privileged from arrest; but the fact, and the cause, of the arrest, must be communicated to the Lord Chancellor or the Speaker, as the case may be.

Where the commanding officer has power to punish summarily, then, in the case of minor punishments, detention in barracks, and in other cases imprisonment in garrison or regimental prisons called provost prisons, are inflicted; or if the sentence of a court-martial does not exceed forty-two days or other prescribed time, it may be carried out in provost prisons. A longer sentence than this must be carried out in public prisons, either civil or military; except pending removal to such prisons if the commitment cannot be immediately carried into effect (Army Act, ss. 63, 64, 65).

These provost prisons include garrison and regimental prisons duly authorised for the imprisonment of soldiers undergoing the above-mentioned sentences in military custody, and are under the control and supervision of general officers commanding (Regulations, s. vi.).

Military prisons are public prisons, and must be so since, under secs. 63, 64, and 65, all military prisoners are to undergo their sentences either in military custody or in a public prison. The Secretary of State for War sets apart any building or part of a building under his control as a military prison, and declares it to be such and a public prison; and the Home Secretary sets apart certain portions of public prisons under his control for the reception of military prisoners, and declares them to be public prisons (Army Act, s. 133).

Rules for the government of these prisons, and the appointment of inspectors, governors, and officers are made by the Secretary of State for War. It is provided by subsec. (2) of the last-mentioned section that for the maintenance of discipline rules may be made authorising corporal punishment not exceeding twenty-five lashes. In respect of the offences for which this can be inflicted, and as to the severity of the imprisonment, military prisons are governed by the Prison Act, 1865 (28 & 29 Vict. c. 126), and the Prison Act, 1877 (40 & 41 Vict. c. 21), or other law in force for the time being relating to public prisons; and they are under the immediate control of the Inspector-General of Military Prisons. The rules distinguish the treatment of prisoners convicted of breaches of discipline, from that of prisoners convicted of offences of an immoral, dishonest, shameful, or criminal character.

Upon conviction by court-martial, either in the United Kingdom or elsewhere, where the sentence is one of penal servitude, the effect is the same as if the person had been convicted in the United Kingdom of an offence punishable by penal servitude, and sentenced to penal servitude, by a competent civil Court; and all enactments relating to a person sentenced to penal servitude by such a civil Court are, so far as circumstances admit, applied accordingly (s. 58). A penal servitude prison under the Act means any prison or place in which a prisoner sentenced to penal servitude by a civil Court in the United Kingdom can be confined (s. 62).

A prisoner who has been sentenced in India or a colony to imprisonment for more than twelve months, or to a term of penal servitude, must be transferred as soon as possible to a prison or convict establishment within the United Kingdom, unless, in the case of imprisonment, the Court, for special reasons, otherwise orders (ss. 60, 131). Certain exceptions are made in the case of Asiatics and Africans, and other persons of colour; as also where persons are born out of the United Kingdom, and domiciled in any place not in the United Kingdom; and where persons have engaged for service in the Royal Malta Artillery, or in any Indian or colonial corps.

When prisoners subject to military law are removed to convict establishments, they are under the authority of the Home Secretary.

[See ARMY; COURTS-MARTIAL; PROVOST-MARTIAL; NAVAL PRISONS: *Manual of Military Law*, War Office, 1894.]

Military Decorations.—By sec. 190 (18) of the Army Act, 1881 (44 & 45 Vict. c. 58), military decorations are defined as any medal, clasp, good-conduct badge, or decoration.

Sec. 24 enacts that every soldier (and this expression practically includes all persons subject to military law other than officers) who makes away with (whether by pawning, selling, destruction, or otherwise howsoever) any military decoration granted to him, is, on conviction by court-martial (*q.v.*), liable to suffer imprisonment, or such less punishment as is in the Act mentioned (see s. 44, and article MILITARY OFFENCES AND PUNISHMENTS).

The military decorations of an officer or soldier are amongst the articles, such as regimental stores, equipments, arms, etc., which (s. 156) it is an offence for any person to buy, exchange, take in pawn, detain, or receive from a soldier, or any person acting on his behalf on any pretence whatsoever; or to solicit or entice any soldier to sell, exchange, pawn, or give away; or to assist or act for a soldier in selling, exchanging, or making away with. Such person is punishable on summary conviction for a first offence to a fine not exceeding £20 and treble the value of the property; and for a second offence, not exceeding £20 together with treble the value, but not less than £5, or to imprisonment with or without hard labour for a term not exceeding six months. The defence must be either ignorance of the nature of the property, or of the person being, or acting for, a soldier, or that the same was sold by order of a Secretary of State or some competent military authority (*Laws* v. *Read*, 1894, 63 L. J. Q. B. 683).

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 52, provides that the provisions of sec. 4 relative to mitigation of punishment and reduction of fines shall not apply to proceedings taken under any Act relating to any of Her Majesty's regular or auxiliary forces. But the imprisonment will follow the scale for fines and imprisonments provided by sec. 17 of the Summary Jurisdiction Act, 1879.

By sec. 44 (11) of the Army Act, 1881, military decorations, as well as military rewards, deferred pay, or service towards pension, may, on conviction by court-martial (and by the Regulations this must be by a court-martial other than a regimental one), or on confession of any offence, be subjected to forfeiture. But see REGIMENTAL DEBTS and MILITARY SAVINGS BANKS.

[*Authority.—Manual of Military Law*, War Office, 1894.]

Military Forces.—See ARMY.

Military Honours.—See WAR.

Military Lands.—See VOLUNTEERS.

Military Law.—Military law is the law by which the armed forces of the Crown are governed both in peace and war, and abroad as well as in the United Kingdom. Growing out of the prerogative of the Crown to make articles of war for the troops when about to be engaged in actual warfare, it was subsequently extended under statutory authority to the general government of the forces at all times. It is now contained in the

Army Act, 1881 (44 & 45 Vict. c. 58), embodying and amending the former Mutiny Acts (*q.v.*) and Articles of War, and supplemented by the Queen's Regulations (*q.v.*) and Army Orders. They are authorised and continued, and from time to time altered and amended, by annual Army Acts, which provide that the Army Act, 1881, while in force, shall apply to persons subject to military law, whether within or without Her Majesty's dominions.

For the military law governing the colonial forces, see COLONIAL FORCES; for the Indian army, that title; and see also MILITIA; RESERVE FORCES; VOLUNTEERS; and YEOMANRY.

For the Courts administering military law, see COURTS-MARTIAL: ARMY: BELLIGERENT; NAVY.

Military Lunatic.—See article ENLISTMENT (ARMY).

Military Manœuvres.—In order to provide facilities for enabling large bodies of troops to be exercised over extensive tracts of country for military instruction, powers were first given to the military authorities by Acts in 1871, 1872, and 1873, enabling them, within certain limits, to occupy lands for this purpose. The Act under which such military manœuvres are now regulated is the Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43). The limits and the period, not exceeding three months, within which the manœuvres are to be executed, are to be specified by Order in Council, the draft of which must be sent to the Council of each county, county borough, district, and parish within the specified limits; and must also be laid on the table of the House of Commons for thirty days before it is submitted to Her Majesty in Council. Advertisements must also be inserted in newspapers circulating in the district. The same limits, or any part thereof, are not to be specified more than once in any period of five years.

There are provisions for preventing undue interference with trade and industry, and for saving from interference dwelling-houses, places of worship, schools, farmyards, gardens, antiquarian objects, etc. By sec. 3 two justices of the peace, not being military officers in command of the forces, may, on application of a commissioned officer, suspend, for not exceeding forty-eight hours, any right of way over any road or footpath. If the road is a county, main, or parish road, they must make the order in petty session, and it must be for a time not exceeding twelve hours, after seven days' notice in newspapers, and subject to such terms and conditions as may be required by the justices. The officer in command must give public notice of the order not less than twelve hours before it comes into force; and he must give all reasonable facilities for traffic whilst it is in force.

A commission, called the Military Manœuvres Commission, consisting of two persons appointed by the Council of each county, and one of each county borough, in the specified limits, and resident owners or occupiers appointed by the Secretary of State, is to be formed, and make orders determining what lands, roads, and sources of water are to be authorised within the meaning of the Act. Sec. 5 contains many provisions as to advertisement of these orders, and the holding of a public meeting to hear objections, etc.

Sec. 6 provides for compensation being made out of money provided by Parliament for damages to person or property; and the Commission,

with the concurrence of the Treasury, appoints a compensation officer or officers to determine and settle the amount payable.

Wilful obstruction or interference with the execution of the manœuvres, or entering without due authority into the camp, is an offence liable to a fine, on summary conviction, of not exceeding forty shillings. Also the moving any flag or other mark used for the purpose of the manœuvres, or cutting or damaging military telegraph wires, is an offence punishable, on summary conviction, with a fine of £5.

See DEFENCE ACTS; FORTIFICATIONS; WAR OFFICE.

Military Necessity.—See WAR.

Military Occupation.—See WAR.

Military Offences and Punishments. — Military offences are such acts or omissions of persons subject to military law (*q.v.*) as may be punished by military Courts. They are of two classes—1st, Those which are not offences against the ordinary law, but are punished as breaches of military discipline. 2nd, Those which are also offences under the ordinary criminal law. The offences of the first class are specified in secs. 1 to 41 inclusive of the Army Act, 1881 (44 & 45 Vict. c. 58), which now, with amendments made by annual Army Acts, contains the body of military law in force both in peace and war, and whether in the United Kingdom or outside (see MUTINY ACTS and WAR).

Many of the more serious acts are punishable with death. Sec. 4 contains many offences in relation to the enemy so punishable, such as shamefully abandoning or delivering up garrisons, etc., holding correspondence with and giving intelligence to the enemy, and so on. Sec. 6 gives a long list of offences punishable more severely when on active service than at other times; and the maximum punishment therefor is death. Mutiny and insubordination (s. 7) are also punishable with death. Striking or using any violence to a superior officer in the execution of his office (s. 8) is so punishable. By sec. 9 the same maximum punishment is affixed to the offence of disobedience, in such manner as to show a wilful defiance of authority, to any lawful command given personally by a superior officer in the execution of his office, whether the same is given orally or in writing, by signal, or otherwise. Desertion, or persuasion to desert, on active service, or when under orders for active service, is also punishable with death (s. 12). These are all the sections which affix the punishment of death to purely disciplinary military offences. Other offences of the same class, but of less seriousness, are punishable with various degrees of severity, and are set out in secs. 12–40.

In regard to offences punishable by the ordinary law as crimes, sec. 41 provides that every person subject to military law shall be deemed to be guilty of an offence against military law, and shall be liable to trial by court-martial for the following offences and to the following punishments on conviction:—Treason, with death, or such less punishment as in the Act mentioned; murder, with death; manslaughter, treason, felony, and rape, with penal servitude or such less punishment as in the Act mentioned; and the effect of a sentence of penal servitude is the same as if it had been passed by a civil Court (s. 58). But a court-martial cannot try them if

they are committed in the United Kingdom; and it cannot try them if they were committed elsewhere within the Queen's dominions unless the offender was on active service, or the place where they were committed is more than one hundred miles from any city or town in which the offender can be tried by a competent civil Court.

In the case of other civil offences not above specified, a court-martial may punish them in the same manner as they are punished under the ordinary law as for acts prejudicial to good order and discipline (s. 40).

Attempts to commit these offences are not, except in one or two cases, made crimes specifically punishable under the Army Act, but the military Court has jurisdiction to try them under sec. 40, as prejudicial to good order and discipline.

In the case of officers, the punishments prescribed are death, penal servitude for a term not less than three years, imprisonment, with or without hard labour, for not more than two, cashiering, dismissal from the service, forfeiture of rank, and reprimand or severe reprimand. In the case of soldiers, death, penal servitude, and imprisonment as above, discharge with ignominy, reduction to the ranks, and forfeitures, fines, and stoppages (s. 44).

The maximum punishment which is attached to each particular offence is stated, and then instead of it there may be awarded any one of the lesser punishments which follow it in the above scales (proviso, s. 44). The proviso also specifies instances in which more than one punishment can be given, *e.g.* an officer is to be sentenced to be cashiered before being sentenced to penal servitude or imprisonment. In addition to, or without any other punishment, in respect of an offence, there may be forfeiture of any deferred pay, service towards pension, military decoration, or military reward, as provided by Royal Warrant (see *Royal Warrant for Pay*, 1897).

Sec. 56 of the Army Act contains provisions enabling a prisoner charged with a greater offence to be found guilty of a lesser offence, *e.g.* on a charge of stealing he may be convicted of embezzlement, or of fraudulently misapplying money or property, and so on.

The confirming authority (see COURTS-MARTIAL) may, before promulgation of the sentence, mitigate, or remit, or commute punishment, or if such punishment is death awarded for murder, then may substitute penal servitude or other less punishment; after promulgation, only Her Majesty, or the Commander-in-Chief (wherever the person may be undergoing his sentence), or the officer commanding the district where the prisoner may for the time being be, and abroad other persons mentioned in sec. 57. A person is not to be punished for any offence triable by court-martial committed more than three years before the date at which his trial begins, except in the case of mutiny, desertion, or fraudulent enlistment. If the offence is also a civil one this does not affect the jurisdiction of the civil Court. Where a soldier has served continuously in an exemplary manner for not less than three years in any corps of the regular forces, he is not to be tried for any such offence of desertion (other than desertion on active service), or of fraudulent enlistment, as was committed before the commencement of such three years; but in the latter case all service prior to such enlistment is to be forfeited (s. 161).

If a person sentenced by court-martial for an offence is afterwards tried by a civil Court for the same offence, regard is to be given to the military punishment already undergone. But, with this exception, nothing is to exempt an officer or soldier from being proceeded against in the ordinary course of law for offences which are crimes. If an officer neglects or refuses

an application to deliver to the civil magistrate any officer or soldier under his command, who is accused or convicted of a crime, or wilfully obstructs or neglects or refuses to assist constables or other ministers of justice in apprehending any such officer or soldier, such commanding officer (*q.v.*) is guilty of a misdemeanour. If the offence is committed out of England it is for all purposes to be deemed to have been committed within the jurisdiction of the High Court of Justice in England. Where a person subject to military law has been acquitted or convicted of an offence by a civil Court, he is not liable to be tried in respect of that offence by a military Court under the Act.

See ARMY; BILLETING; COURTS-MARTIAL; DESERTION; ENLISTMENT; IMPRESSMENT OF CARRIAGES; MILITARY LAW; MILITARY CUSTODY, etc.; MUTINY; NAVY.

Military Savings Banks.—Military, or regimental, savings banks are banks established, or continued, by regulations of the Crown through the Secretary of State for War, with the concurrence of the Commander-in-Chief and the Treasury, under the Military Savings Banks Act, 1859 (22 & 23 Vict. c. 20). Their purpose is to receive money from such non-commissioned officers and men of the army, serving either in the United Kingdom or upon foreign stations (India alone excepted), as may be desirous of depositing the same; and for receiving such deposits of any moneys or funds whatsoever, raised or paid for objects or purposes connected with non-commissioned officers and soldiers, as may be authorised.

The moneys so deposited are applied by the persons authorised to receive them to the payment of the ordinary army services, and are then repaid out of the annual supplies granted by Parliament for the army; the account being kept at the Bank of England in the name of the Commissioners for the Reduction of the National Debt; and payments thereout made upon the warrant of the Secretary of State for War.

The rate of interest allowed on deposits is not to exceed 3¾ per cent.; but is not payable on any sum above £200, unless, after the death of the non-commissioned officer or soldier, for the benefit of his orphans, or other persons entitled to his effects, or to or in the case of funds or moneys raised or paid for charitable regimental purposes.

No forfeiture is allowed by way of punishment for any offence, except under the provisions of a royal warrant (s. 44 (11) of the Army Act, 1881 (44 & 45 Vict. c. 58)).

See REGIMENTAL DEBTS ACT.

Military Service—Service rendered to the Crown in the army, or other military or naval forces, either by officers holding commissions, or, as in the case of the rank and file, by enlistment for a term of years in the army or militia, and reserve of each force, or upon offer and acceptance of such service in the volunteer and yeomanry forces without such limitation.

See ARMY; COMMISSION (IN ARMY); ENLISTMENT; MILITARY LAW; MILITIA; NAVY; OFFICERS; RESERVE FORCES; VOLUNTEERS; YEOMANRY.

Military Tenure.—See KNIGHT'S FEE; KNIGHT'S SERVICE; TENURES.

Military Testament.—Military men, officers and soldiers, have the privilege, when on actual military service, of making nuncupative or other informal wills, freed from the restrictions imposed by the Statute of Frauds (29 Chas. II. c. 3) and the Wills Act (1 Vict. c. 26).

Sec. 23 of the former statute provides that any soldier being in actual military service may dispose of his moveables, wages, and personal estate, as he or they might have done before the Act.

The section also includes "any mariner or seaman being at sea," but the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), makes certain modifications, in regard to this class of person, upon the Statute of Frauds, which do not apply to soldiers' wills.

The Wills Act, s. 11, also provides that any soldier may dispose of his personal estate as he might have done before the making of the Act.

The words "actual military service" confine the privilege to soldiers who are on an expedition; and the will of a soldier made while he is quartered in barracks either at home or abroad, is not privileged (*Drummond* v. *Parish*, 1843, 3 Curt. 522, and the cases in Williams, *Law of Executors*, 9th ed., p. 104).

It has been held that a soldier, though a minor, may make a will, if he is in actual military service; and see *In the goods of M'Murdo*, 1867, L. R. 1 P. & D. 540. Alterations made in this class of will, in the absence of proof to the contrary, are presumed to have been made during the continuance of the military service, and will be included in the probate (*In the goods of Tweedale*, 1874, L. R. 3 P. & D. 204).

These military wills not being either within the Statute of Frauds or the Wills Act, are subject to the rules applicable to wills of personalty made before the 1st January 1838, *e.g.* as to the effect of the marriage of the testator, or the birth of a child subsequent to the date of the will, which in *Doe* v. *Barford*, 1815, 4 M. & S. 10, was held not alone sufficient to revoke the will. See other cases upon these points in Theobald, *Law of Wills*, 4th ed., pp. 52–56.

Probate is granted upon evidence that, if made orally, the substance of the declaration is before the Court, and that it was intended to be testamentary. But probate will not be granted merely upon an affidavit that the testator was in actual military service at the time when the will was made; the Court requiring that the affidavit should set forth the services on which he was engaged (*In the goods of Thorne*, 1865, 34 L. J. P. M. & A. 131).

By the Stamp Duties Act (55 Geo. III. c. 184, Sched. 3) it was provided that Probate and Letters of Administration of the effects of any common seaman, marine, or soldier who should be slain or die in the service of the Crown should be exempted from all duties; and this is still in force.

As to the law relating to the collection of effects and payment of debts on the death of persons subject to military law, see article REGIMENTAL DEBTS ACT, 1893.

[*Authorities.*—*Supra*; and Tristram and Coote's *Probate Practice*; *Manual of Military Law*, War Office, 1894.]

Military Tramways.—See TRAMWAYS.

Military Uniforms.—By the Uniforms Act, 1894 (57 & 58 Vict. c. 45), it is an offence punishable on summary conviction by a fine not

exceeding £5 for any person not serving in Her Majesty's military forces, *i.e.* the regular forces, the reserve forces (*q.v.*), and the auxiliary forces, to wear, without Her Majesty's permission, the uniform of any of these forces, or any dress having the appearance, or bearing any of the regimental or other distinctive marks of any such uniform.

Exceptions are made in the case of members of bands for six years after the passing of the Act, unless the dress is an exact imitation of a uniform; and in the case of the performance of stage plays and music hall or circus performances, or any *bonâ fide* military representation.

By sec. 3, if any person not serving in the naval or military forces wears the uniform of such forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform in such manner or circumstances as to be likely to bring contempt upon the uniform, or employs any other person so to wear it, he is liable on summary conviction to a fine not exceeding £10, or to imprisonment for a term not exceeding one month. The naval forces means the navy, the naval coast volunteers, and the naval volunteers (*q.v.*).

Militia.

I. General or Regular Militia.

The name of militia, as applied to the trained or train bands (*q.v.*), came into use during the contests between Charles I. and the Long Parliament upon the question as to the exercise of the command over them, which had been claimed up to that time, and enjoyed, by the Crown, through the Lords Lieutenant of counties (*q.v.*).

At the Restoration, Acts were passed with the object of settling the law under which the obligations of all citizens to perform military service should be discharged in future; and these enactments were the beginnings of the organised militia system, which was put on its present footing by the Militia Act, 1882 (45 & 46 Vict. c. 49), consolidating and amending previous Acts.

The Act 13 Chas. II. c. vi. recited that the sole government, command, and disposition of the militia, and all forces by sea and land, was the undoubted right of His Majesty; and that an Act was then under consideration for exercising the militia with most safety and ease to the king and his people. This Act was the 14 Chas. II. c. 3. It empowered the Lords Lieutenant of counties (*q.v.*) to call together all such persons, at such times, and to arm and array them in such manner, as thereinafter expressed and declared, and to form them into companies, troops, and regiments, and in case of insurrection, rebellion, or invasion, to lead, conduct, and employ, or cause them so to be, as well within the counties of which they were the lieutenants, as into others, according as they should from time to time receive directions from His Majesty and his successors. The nature and area of service of the militia thus described remains the same at present, and the Militia Act, 1882, s. 12, declares that any part of the militia shall be liable to serve in any part of the United Kingdom, but no part of the militia shall be carried or ordered to go out of the United Kingdom. By sec. 5 of that Act, re-enacting sec. 6 of the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), the jurisdiction and command of the Lords Lieutenant were taken away, and revested in Her Majesty, to be exercisable under the advice of a Secretary of State. See Lord Lieutenant.

The mode of raising the men, under the Act of Charles, up to the year 1757, was by imposing a liability on the part of individuals, according to their estates or revenues, to provide men and arms, and horses, and to pay a certain rate per day, where personal service was not rendered, to a substitute, and to the men whom they thus raised, according to their obligation. For ammunition and other necessaries, rates were raised on the localities; but in case of invasion or otherwise, when the force was called on for active service, the Royal Treasury became responsible. This system was changed in 1757 by 30 Geo. II. c. 25; repealed in 1802 by 42 Geo. III. c. 90. It is important to explain this statute and its subsequent modifications, because, although our present militia is not raised under it, but under the Militia Act of 1882, which is a voluntary enlistment Act, the system of the older Acts, which is a compulsory system with balloting for recruits, may be revived by Order in Council. It has remained in abeyance from 1815 to the present time, except for an interval from 1830 to 1832, and it is suspended annually by the Expiring Laws Continuance Act. Whenever it is revived the provisions as to balloting come into operation, though in other respects it is superseded by the Militia Act of 1882.

The Act of 1757 provided that a fixed number of men should be raised in each county. This number, called the quota, might at intervals of ten years be rearranged by the Privy Council. The parishes in each county had to prepare lists of all men between the ages of eighteen and fifty, and send them to the Lord Lieutenant and deputy-lieutenants, who, at their meetings of sub-divisions, apportioned the quota among the parishes in proportion to the population; or, at their general meetings of lieutenancy, apportioned amongst the sub-divisions any increased or decreased quota made by the Privy Council. The quota was then chosen by the ballot from each parish list; each man drawn had to serve three years or provide a substitute; vacancies were filled in the same way from time to time, and the ballot was repeated every three years.

The subsequent transference of all charges for the maintenance of the militia from the counties to the Imperial Parliament, and the revesting of the command and jurisdiction over it in the Queen, acting on the advice of a Secretary of State, thus making the militia part of the general army system, has rendered the provisions of the Act of George III. obsolete, except as regards the raising of quotas by ballot whenever an Order in Council directs them to be raised. When that happens, this Act, the unrepealed parts of 15 & 16 Vict. c. 50, the Militia Ballot Act, 1860 (23 & 24 Vict. c. 120), and the Militia Act, 1882, must be read together as one Act: and the only remaining duties of the Lords Lieutenant and their deputies, in regard to the militia, will then have to be performed as directed by those Acts. The age for service is now between eighteen and thirty; the term has been raised to five years; substitutes may be provided under the regulations; and there are various exemptions from liability to serve for particular classes of persons, as, *e.g.*, peers of the realm, clergymen, and any poor man who has more than one child born in wedlock. If Quakers refuse to serve, or to provide a substitute, the expense of a substitute may be raised by distress and sale of their goods and chattels.

In 1852, by the above-mentioned Act of 15 & 16 Vict. c. 50, to consolidate and amend the laws relating to the militia, a new mode of raising a militia force, by voluntary enlistment, was instituted; and since then the only militia force that has been kept organised and in training has been so raised. The quota of each county was, in the event of a ballot, then fixed by Order in Council, and still exists as so fixed until altered. The Lords

Lieutenant and their deputies remained the functionaries intrusted with raising and enrolling the volunteer militiamen. If the quotas could not be raised by voluntary enlistment, or in case of invasion or imminent danger thereof, then the power of ordering the ballot, as before mentioned, might be and still may be exercised.

Up to this time the militia was local in its organisation, whether raised by ballot or by voluntary enlistment; and it continued so until the Army Regulation Act, 1871 (34 & 35 Vict. c. 86), when the jurisdiction of Lords Lieutenant of counties in respect of the auxiliary forces was revested in Her Majesty (see LORD LIEUTENANT). The expenses, however, from 1757 were met by issues from the Exchequer authorised by Parliament, for the pay, clothing, and other expenses, except such as arose from the care and custody of the clothes, arms, and ammunition. Since 1871 the counties have been relieved from all charges relating to the militia (except for, and in case of, balloting); the votes for its maintenance have formed part of the annual army estimates; and it has become part of the regular forces, limited as to the time and area of service.

The Militia Act, 1882, consolidates and modifies the various militia enactments, and relates both to the militia if raised compulsorily under the ballot, and to the voluntary militia, except Part II., which only relates to voluntary enlistment; and it can only be understood by keeping these two points distinctly in mind.

The raising of the Militia by Voluntary Enlistment.—The number of men to be raised is provided annually by Parliament, and regulations on this, as on all other matters relating to the militia, may be made, subject to the approval of Parliament (s. 4 (6)).

Every militiaman enlisted is to be so for some county, and be appointed to serve in a corps for that county, or some area comprising the whole or part of the county. The period of service is not to exceed six years; and there may be enlistment for another such period within twelve months from the end of the current term, or at the end of the last training if the man is not more than forty-five years of age (s. 8). Also men who have been discharged after completing one period, and also discharged soldiers of good character, may re-enlist for four years, within three years of the date of discharge, if not more than forty-five years of age. Secs. 9 and 10 apply to militia recruits most of the provisions of the Army Act, 1881, as to oath and attestation. See ARMY.

A man enlisted in the militia remains subject to the Act until duly discharged in the prescribed manner. If a person enlists in the militia who has been discharged with disgrace from any of Her Majesty's forces, or the navy, without declaring the circumstances; or if a person subject to military law is concerned in any such enlistment knowing the circumstances; or if a person subject to military law wilfully contravenes any enactments or regulations relating to enlistment or attestation of militiamen, he is liable (s. 10) to be tried, convicted, and sentenced by court-martial, as under secs. 32 and 34 of the Army Act, 1881; that is, to imprisonment, with or without hard labour, for not more than two years, or one of the less punishments in that Act mentioned; or to be convicted by a Court of summary jurisdiction, and imprisoned, with or without hard labour, for not less than two, and not more than six months. In any case such person may be taken into military custody. By sec. 11 militiamen, subject to prescribed conditions, may enlist in the regular forces, and thus be discharged from the militia. It is no offence to so enlist if the force is not embodied; but if it is, then the prescribed conditions

must be observed, or leaving the militia, and enlisting in any of Her Majesty's forces, or the navy, is fraudulent enlistment, and falls under sec. 13 of the Army Act, 1881, being punishable by court-martial. If a militiaman while on service with regular troops enlists in any of the auxiliary forces, except as prescribed, he is guilty of fraudulent enlistment, and in any other case punishable for making a false answer. So, too, if a man of the auxiliary forces or the navy enters the militia, when he is in actual military service, he is guilty of fraudulent enlistment; and if he is not so serving, of making a false answer.

The above stated law now applies to the militia, whether raised by voluntary enlistment or under the ballot system (s. 26).

Service.—The militia, or any part of it, is liable to serve in any part of the United Kingdom, but not elsewhere. Any part of the militia, however, may make a voluntary offer and be accepted for service, in the Channel Islands, Isle of Man, Malta, and Gibraltar, under regulations (s. 12).

Training.—There is an obligation to submit to preliminary training, for a period not exceeding six months, by the prescribed officers, non-commissioned officers, and men of the regular forces or of the militia. An annual training of not less than twenty-one, and not more than twenty-eight, days, unless by Order in Council it is extended to not more than fifty-six, or reduced or dispensed with altogether, is compulsory. The provisions as to notices to the men of time and places of training, and also as to embodiment, are contained in secs. 21 and 22.

Embodiment.—In case of imminent national danger or of great emergency, the militia may be embodied for service by proclamation. If Parliament is sitting, the occasion must be first communicated to it; if not, it must be declared in Council, and notified in the proclamation; and the proclamation, and the directions given by it, have the same effect as if they were enacted by the Militia Act. If Parliament is not sitting it must be summoned to meet within ten days of the proclamation (s. 18). The militia is also disembodied by proclamation (s. 20).

When subject to Military Law.—The Army Act, 1881, s. 175, subjects to military law as officers, and declares the Act to apply accordingly to, all the persons so specified, and (*inter alia*) officers, members of the permanent staff not otherwise subject to military law, and all other officers of the militia. Until 1877 they were only subject to military law during training or embodiment; but now they are in the same position in this respect as officers of the regular forces on the active list. The men of the militia were not subject to military law, even during embodiment, until 1757; and during training they were only liable to civil punishments for military offences until 1761, when they were at that time also put under military law. Now by sec. 176 of the Army Act all persons there specified are subject to military law as soldiers, *i.e.* (*inter alia*) non-commissioned officers and men of the permanent staff not otherwise subject to military law, and all non-commissioned officers and men during their preliminary training: when they, or the body of militia to which they belong, are being trained or exercised, either alone or with any portion of the regular forces or otherwise; when attached to, or otherwise acting as part of or with, any regular forces; and when embodied.

When so subject, all officers and men are subject to the Act in all respects as if they were part of the regular forces, and the provisions of the Act are to be construed as if such officers and men were included in the expression "regular forces." Therefore all the provisions relating to punishment by courts-martial (*q.v.*) and otherwise of regular soldiers apply when

military law is applicable to any persons by the militia. It is provided, however, by Rule 20 *b* of the Rules of Procedure by Court-Martial, that if practicable one member of the Court, at least, shall be an officer of the militia.

Desertion.—Failing to appear at the time and place appointed, either for preliminary training, annual training, or embodiment, without leave, sickness, or other reasonable excuse allowed by the Orders and Regulations, is either desertion or absence without leave as in the Army Act (see ARMY), and may be tried and punished by court-martial accordingly, or, upon conviction by a Court of summary jurisdiction, a fine of not less than forty shillings and not more than twenty-five pounds may be imposed; and in default of payment, imprisonment, with or without hard labour, for not less than seven days, and not more than the maximum term allowed by law for non-payment of the fine (see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 5)).

The provisions in sec. 154 of the Army Act as to apprehending and bringing deserters and absentees without leave of the regular forces before a Court of summary jurisdiction, are applied to militiamen by sec. 24 (1).

A Court of summary jurisdiction may impose a fine not exceeding twenty pounds on any person who procures or persuades a militiaman to be absent without leave, or attempts to procure or persuade him to commit such an offence; or aids or assists him in so being absent, or conceals or aids or assists in concealing him, or employs or continues to employ him, or aids or assists in his rescue, knowing him to be an absentee without leave (s. 25 (1)).

Sec. 153 of the Army Act relating to inducing soldiers to desert, and imposing imprisonment on summary conviction with or without hard labour for not exceeding six months, is applied as if the militiaman were a soldier; and any person who knowing any militiaman to be a deserter, employs or continues to employ such militiaman, is deemed to aid him in concealing himself as above mentioned (s. 25 (2)).

There are various provisions in sec. 27 relating to the liability for further service of militiamen who have been guilty of any of the offences above mentioned.

The fines for these offences, and any fines or pecuniary forfeitures which are recoverable for any offence under the Militia Acts, when the prosecution is instituted by the commanding officer are to be paid (unless their application is otherwise provided for by those Acts) to the commanding officer, and accounted for by him in the prescribed manner (s. 42).

When an offence is triable, either by a Court of summary jurisdiction or a court-martial, the choice of Courts is prescribed by regulations.

Proceedings may be instituted whether the term of service has or has not expired, and within two months after the offence becomes known, or after apprehension, notwithstanding any limitation in any other Act (s. 43 (2)).

If an offender has been guilty of several offences he is deemed to belong to any one or more of the corps in which he has been; and he may be convicted and punished for all the offences of which he is found guilty (s. 43 (3)).

Miscellaneous Provisions.—The property qualifications for officers in the militia have all been abolished since 1869 (32 & 33 Vict. c. 13).

The acceptance of a commission does not vacate the seat of any member of Parliament. All persons in the militia may vote at parliamentary elections without penalty or punishment on account of absence whilst voting, or going to, or returning from voting (ss. 38, 39, Militia Act, 1882).

A sheriff who is a militia officer is discharged during embodiment from personally performing the office of sheriff, and the under-sheriff is made answerable for the execution of the office (*ibid.* s. 40). Also by sec. 181 (5) of the Army Act, 1881, the competence or liability of an officer of the militia (as of other auxiliary forces) to be nominated or elected to or to hold the office of sheriff, mayor, or alderman, or an office of a municipal corporation, is not affected by reason of the battalion or corps to which he belongs being assembled for annual training at the time of such nomination or election, or during his tenure of office. But a person in the militia is not compelled to serve as a peace officer or parish officer (s. 41, Militia Act, 1882).

Lords Lieutenant and deputy-lieutenants, when acting in the execution of the Militia Acts, are protected as justices of the peace, save as regards limitation of actions, notice of action, venue, etc., which are otherwise provided for by sec. 46. Thus it is provided by that section, subsec. (2), that an action, prosecution, or proceeding against any person for any act done in pursuance or execution, or intended execution, of the Militia Acts, or for neglect or default in respect of executing them, must be brought within twelve months (reduced to six by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)); and there are other provisions as to tender of amends being pleaded, costs, etc.

In regard to billeting and impressment of carriages (*q.v.*), the Army Act, 1881, s. 181 (3), provides that the militia shall be under the provisions of the Act in regard to those matters when subject to military law as if it were part of the regular forces.

For the modified application of the Militia Acts to certain places, such as the Isle of Wight, the Tower Hamlets, City of London, the Cinque Ports, etc., see secs. 49 and 50 of Militia Act, 1882.

II. Local Militia.

To complete the account of the militia system it is necessary to refer to the local militia, which may be described as a supplementary force raised by a compulsory method similar to that of the regular militia under the ballot, but whose origin is different, and which differs from it in some particular respects. The Acts establishing it were first passed in 1808, and were consolidated in 1812 by the Local Militia Act, 52 Geo. III. c. 38, whose provisions are still in force, although the local militia, like the regular militia raised by ballot, has been in abeyance since 1816, when the king, by 56 Geo. III. c. 38, was empowered to suspend the ballot by Orders in Council. These Orders in Council were made down to 1832, and then discontinued; and the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91), repealed the statute as obsolete.

The conditions under which it might be again raised by ballot are these: If the number of men serving in any county, including effective yeomanry and volunteers, should amount to six times the quota fixed by Parliament as before mentioned, no enrolments of local militia are to be made. The men would be raised by ballot from amongst those between the ages of eighteen and thirty. A man so drawn must serve for four years, without being able to provide a substitute, and without any bounty. When the force is established there is to be annual training; and it may be called out to suppress riots.

The power of embodying the force differs from that existing in the case of the general militia. Instead of its being embodied in any case of national danger or great emergency, the instances mentioned by the Act which we are considering are, invasion, the appearance of an enemy on the coast, and

rebellion. Moreover, the time of meeting of Parliament after proclamation of embodiment is not ten days, but fourteen. In other respects what has been said in regard to the command, officers, discipline, and liability to military law of the regular militia applies to the local militia. For certain sections of statutes repealed by Militia Act, 1882, but re-enacted by that Act as to local militia, see 3rd Sched. thereto.

See ARMY; COMMISSION; COURTS-MARTIAL; LORD LIEUTENANT; MILITARY LAW; RESERVE FORCES.

[*Authorities.*—Clode, *Military Forces of the Crown*; Anson, *Law and Custom of the Constitution; Manual of Military Law*, War Office, 1894.]

Milk.—The sale of milk as a commodity is regulated by the Sale of Food and Drugs Act (see ADULTERATION; FOOD). The business of cowkeeper and milk seller is also subject to regulation in the interests of public health, because of the risk of infection through milk. Dairies, including all farms, farmhouses, cowhouses, milk stores, milk shops, or other places from which milk is supplied, or in which it is kept for purposes of sale, and the dairymen or cowkeepers for sale of milk (*Umfreville* v. *L. C. C.*, 1897, 66 L. J. Q. B. 177), and milk purveyors are in London subject to registration and supervision by the London County Council, except in the city, where the Common Council acts (1891, c. 76, ss. 28, 141). Under these orders the local authority is empowered to make regulations of its own, subject to approval by the Local Government Board. The orders are printed in Hunt, *London Government*, i. 370; St. R. & O., Revised, vol. ii. p. 686; and Glen, *Public Health*, 11th ed., 1689.

In the rest of England dairies, etc., are subject to like registration and supervision in county districts by the district council (1878, c. 74, s. 34; 1886, c. 32, s. 9).

Regulations made by Order in Council in 1885 are still in force (which operate in London under secs. 28 and 142 of the Public Health Act, 1891), and are supplemented by an order made in 1886 by the Local Government Board, which in 1886 (49 & 50 Vict. c. 32, s. 9) was substituted for the Privy Council (see St. R. & O., Revised, vol. ii. p. 686). Outside London, under the Infectious Diseases Prevention Act, 1890 (c. 34, ss. 4, 24), further powers are given to local authorities to inspect dairies when infectious disease is there prevalent or is traceable to the milk there supplied, and to prohibit the sale of milk while danger of infection continues.

Mill Dam.—1. A bank or barrier put across running water to hold it back for use by means of a leat or channel for propelling the machinery of a mill. It is legal for a riparian owner on a non-navigable stream to set up such a bank, provided he does not thereby interfere with the lawful use by other proprietors, or inflict on them appreciable injury (*Milner* v. *Gilmour*, 1858, 12 Moo. P. C. 156; *Nuttall* v. *Bracewell*, 1866, L. R. 2 Ex. 9; *Swindon W. W.* v. *Wilts and Berks Canal*, 1875, L. R. 7 H. L. 697).

If it does interfere with or injure the rights of others, it can be justified only by the grant of an easement or prescriptive user within sec. 2 of the Prescription Act, 1832 (2 & 3 Will. IV. c. 71); see Gale on *Easements*, 6th ed.; Goddard on *Easements*, 5th ed. These rules depend on the common law or statute, and are independent of the numerous manorial customs with reference to mills. See Vin. *Abr.* tit. "Mill," "Watercourse."

2. Unlawful and malicious injury to mill dams and weirs is punishable,

under secs. 30, 31 of the Malicious Damage Act, 1861, according as the dam is in public or private waters.

3. Weirs and mill dams erected on navigable rivers since Magna Carta are illegal (*Rolle* v. *Whyte*, 1877, L. R. 3 Q. B. 286; see Moore on *Foreshore*; SEWER; WEIR).

Mines and Minerals.

TABLE OF CONTENTS.

Meanings of Mine, Vein, Seam, and Quarry 402
Meaning of Minerals 403
Meaning of "Mines of Minerals" . 404
Open and New Mines and Quarries . 404
Property and Possession—Generally 404
Property—Particular Localities . 404
Property in Mines Royal . . 405
Constructive Possession . . . 405
Workings by Tenant in Fee . . 405
Workings by Tenant for Life or Years 405
Workings by Trustees . . . 406
User—Freeholds and Leaseholds . 406
Workings in Copyholds and Customary Freeholds 406
Workings in Wastes 406
Workings by Parson 406
Workings by Mortgagor or Mortgagee 406
Workings in Lands subject to Contract 406
Workings by Railway Companies, etc. 406
User—Copyholds 406
Workings founded on Custom or Prescription 407
User founded on Custom . . . 407
Workings as between Co-owners . 407
Workings as between Co-owners of Land but Partners in Working . 407
Workings as between Ordinary Partners 407
Powers with respect to Sales, etc. . 408
Powers with respect to Leases . . 408
Contracts 409
Sales 409
Leases 409
Licences 411
Bankruptcy and Death . . . 411
Support—Generally 411
Support—*Primâ Facie* Rights . . 412
Support—Variation of *Primâ Facie* Rights 413
Support — Construction — Railways and Waterworks Clauses Acts . 414
Support—Prescription . . . 415
Support—Brine-Pumping . . 415
Support from Water . . . 415
Support—Remedies 416
Sinking Pits, etc., Quarrying and Excavating Subsoil . . . 416
Roadways 416
Water—Using and Abstracting . 417
Water—Fouling 417
Water—Discharge and Escape . . 417
Air 418
Smoke and Fumes 418
Stannary Courts 418
Tin Bounding 419
The Cost Book System and Cornish and Devonshire Companies . . 419
Gloucestershire Rights and Customs 421
Derbyshire Courts Rights and Customs 421
Isle of Man 422
Durham and Yorkshire . . . 422
The Colonies 422
Wrongful Possession . . . 422
Wrongful Abstraction . . . 422
Criminal Remedies 423
Taxes, Duties, Rates, and Tithes . 423
Coal Mines Regulation Acts . . 423
Metalliferous Mines Regulation Acts 424
Quarries Fencing and Regulation Acts 425
Factory and Workshop Acts . . 425
Truck Acts 425
Employers and Workmen Act . 425
Employers Liability Act . . . 425
Workmen's Compensation Act . 425

Meanings of Mine, Vein, Seam, and Quarry.—Speaking generally, a "mine" may be defined to be "an excavation in the earth which yields minerals." The word is, however, used in several senses; and to ascertain these senses precisely it is necessary to contrast it, on the one hand, with a vein or seam, and, on the other hand, with a quarry. In its primary sense mine appears to imply openness; and vein or seam in its primary sense appears to exclude that notion. In a secondary sense, however, a mine may mean a closed vein; and a vein or seam may, in a secondary sense, be called a mine. The distinction between a mine and a quarry is in part shown by the derivations or supposed derivations of the two words. It is

said that the medieval Latin term *minare* means "to lead a passage underground," and that the French word *quarriere* means "the place where stones are cut in squares." The primary legal sense of each word is consistent with these different derivations. If the article sought for is obtained by underground workings, the place from which it is obtained is a mine; if it is obtained by surface workings the place is a quarry (*Bell* v. *Wilson*, 1865, 2 Drew. & Sm. 399).

A brick field, or gravel pit, is therefore a quarry: whereas an underground excavation for limestone or freestone is a mine. Effect has been given to this distinction in cases arising under the Rating Act, 43 Eliz. c. 2, and the Metal. Mines Reg. Act, 1872. However, in a secondary sense of each word this distinction is disregarded, or rather transposed. It is common to speak of an iron mine, even when the iron is worked from the surface; and it is invariable to speak of a gold mine, although gold is nearly always worked from the surface. On the other hand, it is common to speak of a slate quarry, although the workings are underground. And the strict legal meanings of "mines" and "quarries" may be varied by the context, an example of which is to be found in the Income Tax Act, 5 & 6 Vict. c. 35, Sched. A. A statement of the meanings of "mine" and "quarry" would be incomplete without noticing one point of interest, and of frequent importance: The owner of the mine or quarry is, in that character, the owner of the chamber which contains the minerals; and his interest in that chamber is the same, whether it is filled with minerals, or they have been worked out, and it is left empty (*Eardley* v. *Granville*, 1876, 3 Ch. D. 826).

Meaning of Minerals.—Primarily "mineral" means that which grows in a "mine"; and, if this were its legal sense, it would be confined to substances obtained by underground workings. On the other hand, it sometimes means every substance forming part of the crust of the earth, other than the layer which sustains vegetable life; and, if this were its legal sense, it would be almost equivalent to "soil." Its *primâ facie* legal sense is wider than the first meaning above mentioned, and narrower than the second. Its legal sense disregards its etymology; and includes within it, *primâ facie*, every substance which can be got from underneath the surface, whether by underground workings, or by open quarrying (*Hext* v. *Gill*, 1872, L. R. 7 Ch. 712). On the other hand, it requires that substance to be of commercial value (*Hext* v. *Gill*, *supra*; *Hamilton* v. *N. B. Rwy. Co.*, 13 Sess. Cas. Ser. 4, 454); and it also requires it to be part of the natural soil. It cannot be said that a definition, of which the element of commercial value is an essential, is altogether satisfactory. Whether a particular substance is a mineral or not is a question which may depend upon its use and value for the time being, and a "mineral one year may not be a mineral the next." In fact, in this respect, it may be impossible to say for certain whether a particular substance is a mineral or not (*Glasgow* v. *Farie*, 1888, 13 App. Cas. 657; *Jersey* v. *Neath Poor Law Union*, 1889, 22 Q. B. D. 555; *Mid. Rwy. Co.* v. *Robinson*, 1890, 15 App. Cas. 19). As an illustration of the requirement that the substance should be part of the natural soil, reference may be made to the case of the prehistoric boat embedded in the subsoil (*Elwes* v. *Brigg Gas Co.*, 1886, 33 Ch. D. 562). The *primâ facie* legal sense of "minerals" will not be easily restricted. Where, for example, the expression used is "mines and minerals," the word "mines" will not be held to restrict the meaning of the word "minerals" to substances worked by underground workings; and so where an Inclosure Act reserves "mines and minerals" to the lord. Of course, however, where an intention is

shown, the meaning will be restricted; and it may be shown either from the language of the instrument, or from the circumstances under which it takes effect, or from the custom or usage of the district.

Meaning of "Mines of Minerals."—The expression "mines of minerals" has a peculiar meaning in the Railways and Waterworks Clauses Acts; and it is important to notice it, having regard to the wide application of these Acts, and the numerous cases arising thereunder. Freestone and limestone ordinarily got by surface operations are "minerals" within the Acts; and surface workings of such minerals are therefore "mines of minerals," and excepted accordingly upon a purchase (*Mid. Rwy. Co.* v. *Robinson*, 1890, 15 App. Cas. 19). On the other hand, common clay, sand or gravel, which forms the upper soil, is not excepted (*Glasgow* v. *Farie*, 1888, 13 App. Cas. 657).

Open and New Mines and Quarries.—The difference between an open mine or quarry, and one that is new, is of general importance. A mine becomes open, when a person, acting lawfully, makes a profit from its produce, whether by means of sales or a lease (*Elias* v. *Snowdon, etc., Co.*, 1879, 4 App. Cas. 461). Nor is it necessary that such person should be the author of the settlement, if the question arises under a settlement. Mere preparations, however, to open a mine do not make it open. Nor do experimental openings, or openings for a restricted purpose, or openings without a required consent, or by way of trespass. A new seam in an open mine may itself be an open mine; and the sinking of a new pit is not necessarily the opening of a new mine. A dormant mine continues open or not, according as the working of it has been abandoned temporarily or permanently.

Property and Possession—Generally.—The surface owner is presumptively entitled to everything beneath, except royal mines (*Pountney* v. *Clayton*, 1883, 11 Q. B. D. 838). However, the surface and the mines may be shown to be in different hands; either by producing the instrument severing the titles, or by producing evidence of long actual separate enjoyment (*Humphries* v. *Brogden*, 1850, 12 Q. B. 739). The property in mines under highways, and non-navigable rivers, follows the ownership of the soil. The presumption of ownership *usque ad medium filum* does not, however, apply to a canal. The property in mines under navigable rivers, the sea, and the seashore, follows the ownership of the soil. The reversioner or remainderman has the right of property in mines; but the tenant for life or years has the right of possession. And, as the owner of a mine is in that character the owner of the chamber which contains the minerals, the rights of property and possession comprise corresponding rights in respect of such chamber (*Eardley* v. *Granville*, 1876, 3 Ch. D. 826). The right of property in mines in copyholds is in general in the lord; but may by custom be in the copyholder. The right of possession is in the copyholder; and the rights of property and possession comprise corresponding rights in respect of the containing chamber. The right of property in mines in customary freeholds is in general in the lord, and the right of possession in the tenant. The right of property may, however, be shown to be in the tenant. Upon a voluntary enfranchisement the grantee becomes entitled *primâ facie* to the mines. The property in mines in the waste of a manor is vested *primâ facie* in the lord. Upon an inclosure the property in the mines becomes vested *primâ facie* in the allottees of the surface.

Property—Particular Localities.—The Crown has the right of property in almost all mines and quarries in the Hundred of St. Briavels, in the

county of Gloucester; in lead mines in the king's field, in the Hundred of High Peak, in the county of Derby, and in the king's field, in the soke and wapentake of Wirksworth, in the same county; and in mines, quarries, and minerals (except clay or sand) in the customary estates of inheritance in the Isle of Man. The right of property in mines and minerals in the seventeen assessional manors of Cornwall is partly in the freehold tenants; partly in the lord of the manor of Tywarnhaile Tyas; but principally in the Duke of Cornwall. The right of property in mines under the sea, seashore, and rivers in and near Cornwall is partly in the Duke of Cornwall, and partly in the Crown.

Property in Mines Royal.—The Crown is presumptively entitled at common law to all mines of gold and silver. In fact, gold and silver mines are properly called "mines royal," and mines of all other substances "base mines." And in the Case of Mines it was laid down, that, if gold or silver was contained in base metal, the Crown was also presumptively entitled to the base metal. Relaxations in favour of the subject were, however, effected by the Acts 1 Will. & Mary, c. 30, and 5 Will. & Mary, c. 6. The object of these Acts was to secure to the subject the copper, iron, tin, and lead ores found in his soil, and at the same time to secure to the Crown all the gold and silver if it chose to take it, paying the value of the copper, iron, tin, and lead ores. A mine which is worked for nothing but gold is none the less a royal mine within the Acts, because it also contains copper, iron, and lead, but in such small quantities as not to be worth working (*A.-G.* v. *Morgan*, [1891] 1 Ch. 432). The presumption that the right of property in mines royal is vested in the Crown may be rebutted by the evidence of ownership in a subject.

Constructive Possession.—Possession of the whole of a mine may be presumed from a rightful possession of a part; and physical possession of a part, with an enforceable agreement for a lease of the whole, will be a constructive possession of the remainder. But physical possession by a wrong-doer of a part creates no conclusive presumption of his possession of the whole; and mere physical possession of one seam creates no presumption of possession of the underlying seams.

Workings by Tenant in Fee.—An infant tenant in fee in possession may, by his guardian, work mines, open and new. The Court may authorise the working of mines belonging to a lunatic tenant in fee. The Court may also authorise the expenditure of personal estate of a lunatic in working his open mines.

Workings by Tenant for Life or Years.—A tenant for life or years may *primâ facie* work open mines or quarries (*Elias* v. *Snowdon, etc., Co.*, 1879, 4 App. Cas. 454; *Campbell* v. *Wardlaw*, 1883, 8 *ibid.* 645, etc.). Similarly, proceeds of sales by settlement trustees of the produce of open mines; and the capital of rents under leases of open mines; belong to the tenant for life. A dowress is in the same position as an ordinary tenant for life (*Stoughton* v. *Leigh*, 1808, 1 Taun. 402; 11 R. R. 81). The general rule does not, however, *primâ facie* apply to mines comprised in a residuary devise. A tenant for life or years may not, *primâ facie*, work new mines (*Elias* v. *Snowdon, etc., Co.*, 1879, 4 App. Cas. 454): for such an act would be legal waste; and a dowress or jointress stands upon the same footing. However, when a mining lease, or its equivalent, has been granted, the tenant for life or years may work the mines, although new; unless the land contains both open and new mines. Local custom may give a tenant for life or years greater rights than he would otherwise have. And a tenant for life "without impeachment of waste" may work new mines (*Campbell* v. *Ward-*

law, 1883, 8 App. Cas. 656). In the case of improper workings by a tenant for life, the reversioner or remainderman in fee may have trover; or an account. And his right to an account never, as in timber cases, depended upon his right to an injunction; as mining operations are a species of trade. Trustees to preserve contingent remainders may also have an account (*Garth* v. *Cotton*, 1750, 2 White and Tudor, *L. C.*, 7th ed., p. 970). The mode of dealing with the proceeds differs according as there is, or is not, a person *in esse* entitled to the inheritance. An injunction may also be obtained. But before an interlocutory injunction will be granted, a clear case must be shown; on account of the injury which may otherwise be caused. The remedy may be barred after six years by the Statute of Limitations. Delay and acquiescence may also be a bar. The remedy is not barred by death (*Garth* v. *Cotton*, *supra*).

Workings by Trustees.—The Conveyancing Act, 1881, authorises trustees in certain cases to work mines (ss. 41, 42).

User—Freeholds and Leaseholds.—Where mines are severed from the rest of the land, the mine owner may use the containing chamber in any manner he thinks proper (*Proud* v. *Bates*, 1865, 34 L. J. Ch. 406, 411; *Hamilton* v. *Graham*, 1871, L. R. 2 Sc. & D. 166).

Workings in Copyholds and Customary Freeholds.—A copyholder may work open mines (*Bourne* v. *Taylor*, 1808, 10 East, 189, 202, 203; 10 R. R. 267). But he may not *primâ facie* work new mines; as he would thereby commit waste (*Eardley* v. *Granville*, 1876, 3 Ch. D. 826, 833). And, if he does so work, the lord may forfeit: and he may have trover, or an account; and an injunction. But acquiescence may be a bar to an injunction. The death of the copyholder is no bar to an account. The lord may not work new mines (*Player* v. *Roberts*, Sir W. Jones, 243). If he does, the copyholder may have trespass; or an account; and also an injunction. The position in the case of customary freeholds is the same as in the case of copyholds (*Portland* v. *Hill*, 1866, L. R. 2 Eq. 765, 777).

Workings in Wastes.—The lord may, *primâ facie*, open mines in wastes (*Filewood* v. *Palmer*, 5 Vin. *Abr.* p. 8, s. 33); provided he leaves sufficient common (*ibid.*; *Hall* v. *Byron*, 1877, 4 Ch. D. 667).

Workings by Parson.—A parson may work open mines (*Knight* v. *Mosely*, Amb. 176). But he cannot work new mines (*Eccles. Comms.* v. *Wodehouse*, [1895] 1 Ch. 562).

Workings by Mortgagor or Mortgagee.—A mortgagor may work unless he prejudices the security. A mortgagee in possession may work open mines (*Elias* v. *Snowdon, etc., Co.*, 1879, 4 App. Cas. 454, 460). But he may not, *primâ facie*, speculate as if he were an absolute owner (*Rome* v. *Wood*, 2 Jac. & W. 555, 556). He is not bound to work new mines (*Hughes* v. *Williams*, 12 Ves. 493, 496; 8 R. R. 364). Nor may he do so, unless his security is insufficient (*Millett* v. *Davey*, 1862, 31 Beav. 470, 475); nor in any event may he speculate (*ibid.* 476).

Workings in Lands subject to Contract.—A vendor, who works, is liable to account. A purchaser or lessee, who is allowed into possession before completion, and works, may be ordered to pay his purchase money or rent into Court (*Lewis* v. *James*, 1886, 32 Ch. D. 326).

Workings by Railway Companies, etc.—A railway, or waterworks or harbour company may not, *primâ facie*, work mines (*Dixon* v. *Caledonian, etc., Co.*, 1880, 5 App. Cas. 822).

User—Copyholds.—The lord may not, *primâ facie*, dig pits, or deposit rubbish on the surface (*Ballacorkish, etc., Co.* v. *Harrison*, 1873, L. R. 5 P. C. 59, 60); or use the surface or subsoil for carrying manorial minerals. Nor,

where he may use the subsoil for carrying manorial minerals, may he, *primâ facie*, also use it for carrying foreign minerals (*Eardley* v. *Granville*, 1876, 3 Ch. D. 826).

Workings founded on Custom or Prescription.—A right of profit *à prendre* is not in general claimable by custom. But a copyholder may by custom work in the wastes of a manor; but cannot do so without restriction (*Wilson* v. *Willes*, 1806, 7 East, 121; 8 R. R. 604). However, a right of profit *à prendre* may in general be claimed by prescription; but the claim cannot be made without restriction (*A.-G.* v. *Mathias*, 1858, 4 Kay & J. 579). But a copyholder may not by prescription work in the wastes of a manor. A right of profit *à prendre* cannot be claimed under a lost grant; or under the Prescription Act. A copyholder may by custom work new mines in his copyhold; and such custom may be good, although the right be exercisable without limit (*Salisbury* v. *Gladstone*, 1861, 9 H. L. 692); and the right is not affected by the Prescription Act. But the onus of proving the custom is on the tenant (*Portland* v. *Hill*, 1866, L. R. 2 Eq. 765). A lord may by custom work new mines in copyholds (*Bourne* v. *Taylor*, 1808, 10 East, 189; 10 R. R. 267). Whether a lord can by custom work mines in wastes without leaving sufficient common is doubtful (*Bateson* v. *Green*, 1793, 5 T. R. 411; *Badger* v. *Ford*, 1819, 3 Barn. & Ald. 153, 155; 22 R. R. 331). A lord may by prescription work mines in copyholds (*Paddock* v. *Forester*, 1842, 3 Man. & G. 903).

User founded on Custom.—A lord may by custom dig pits in copyholds for the purpose of working the mines; or deposit rubbish thereon (*Ballacorkish, etc., Co.* v. *Harrison*, 1873, L. R. 5 P. C. 59); or use the subsoil for carrying the minerals (*Eardley* v. *Granville*, 1876, 3 Ch. D. 833). But a customary user of copyholds must not be without limitation (*Broadbent* v. *Wilks*, Willes, 360).

Workings as between Co-owners.—Any joint-tenant, tenant in common, or coparcener of a mine may work it (*Job* v. *Potton*, 1875, L. R. 20 Eq. 84, 93). But no co-owner may appropriate more than his share, nor is he in general entitled to a lien for his expenses, or to a contribution.

Workings as between Co-owners of Land but Partners in Working.—A co-owner of the land, who is a partner in the working, may work the mine (*Roberts* v. *Eberhardt*, 1854, Kay, 148, 159, 161–163). But he may not appropriate more than his share. If, during the working, one of the partners becomes indebted to another, the creditor has a lien on the debtor's share in the partnership (*Fereday* v. *Wightwick*, 1829, 1 Ry. & M. 45; 32 R. R. 136).

Workings as between Ordinary Partners.—An ordinary partner may work the mine (*Crawshay* v. *Maule*, 1818, 1 Swans. 495). And, if there is exclusion, or waste, or disagreement as to the mode of working, he may, in an action seeking dissolution or accounts, have a receiver and manager. But he must be prompt to take the proper steps. He may not appropriate more than his share. A partner, who renews in his own name the lease of a mine, will be a constructive trustee for the partnership. A partner may in general have a contribution towards losses; and may have a lien on his copartner's share to secure a debt (*Norway* v. *Rowe*, 19 Ves. 160; 12 R. R. 157). A person with a mere equitable interest, who desires an account, must proceed promptly (*Clarke* v. *Hart*, 1858, 6 H. L. 633). But mere laches are no bar to a person with a legal interest (*ibid.*). The right to enforce a trust of mining property will also in many cases be lost unless it is promptly asserted (*ibid.*). The manager of a mining partnership may usually bind the partners generally by dealings on credit; and probably by

borrowing money for the necessary purposes of the concern; but he may not usually bind them by negotiating bills.

Powers with respect to Sales, etc.—The committee of a lunatic tenant in fee may sell his mines under the authority of the Court (Lun. Act, 1890, s. 120). Mines belonging to a tenant for life may be sold under the Settled Estates Act, 1877; or under the Settled Land Acts; and may be sold separately from the surface. In each case the proceeds are applicable as capital; and one of the modes of applying capital moneys under the Settled Land Acts is for preliminary works for mines, or reconstruction of such works. Trustees may not sell mines separately from the surface under a mere power to sell lands; but they may obtain power to do so under the Trustee Act, 1893. And under the Amendment Act, 1894, mortgagees are in a similar position. A co-owner of a mine may transfer his share without the consent of the other owners. A partner has a similar right; and since the Partnership Act, 1890, such a transfer does not apparently dissolve the partnership, but is merely a circumstance enabling the Court to do so. When a co-owner applies to the Court, he may sometimes have a partition; but usually a sale is his proper remedy. A partner may not have partition. The sale provisions of the Partition Acts apply to a co-owner of mines. A partner may have a sale without regard to the Acts. Companies and local authorities, purchasing under compulsory powers, may purchase mines; whether the surface and the mines are owned by the same person, or by different persons (*Errington* v. *Metropolitan Rwy. Co.*, 1882, 19 Ch. D. 559); and none the less that the Railways or Waterworks Clauses Act may apply to them. A company purchasing under the Lands Clauses Act must purchase the whole land including the mines (*Pountney* v. *Clayton*, 1883, 11 Q. B. D. 833); but a company purchasing under the Railways or Waterworks Clauses Act may purchase the land without the mines (*ibid.*). When mines are expressly purchased by a railway company, and the lands containing them are kept by the company for the sole purpose of working the mines, they become "superfluous" (*Hooper* v. *Bourne*, 1880, 5 App. Cas. 22). The Commissioners of Woods may sell Crown mines under the Act 10 Geo. IV. c. 50. The Prince of Wales may sell Duchy mines under the Duchy of Cornwall Management Act, 1863. Church mines may be sold under the Act 21 & 22 Vict. c. 57. An enfranchisement under the Copyhold Act, 1894, does not affect the right to mines without the express consent in writing of the lord or tenant. The lord of a manor may under the Statute of Merton approve as against common of pasture. But he may not appropriate the mines as against common of turbary; unless under a special custom; and in such a case he must leave a sufficiency of common. Commons may now be inclosed and the rights as to mines therein regulated under the Act 39 & 40 Vict. c. 56.

Powers with respect to Leases.—Mines of an infant tenant in fee may be leased under the Act 1 Will. IV. c. 65, or under the Settled Estates Act, 1877, or under the Settled Land Acts. Mines of a lunatic tenant in fee may be leased under the authority of the Court (Lun. Act, 1890, ss. 120, 122). But when the mines are real estate, and are new, the rents are applicable as real estate. A tenant for life, with a power to lease "lands," may, although impeachable of waste, lease the open mines; and appropriate the rents (*Campbell* v. *Leach*, 1775, Amb. 740). And a tenant for life, without impeachment of waste, has a similar power as regards new mines; but not a tenant for life impeachable of waste (*Clegg* v. *Rowland*, 1866, L. R. 2 Eq. 165). It follows that a tenant for life may, under sec. 46 of the Settled Estates Act, 1877, lease open mines; and, if unimpeachable of

waste, new mines; for twenty-one years; and appropriate the rents. And, under sec. 4 of the same Act, he may obtain power to lease both new and open mines for forty years. But in such a case one-fourth, or three-fourths of the rents, according as he is or is not entitled to work for his own benefit, must be applied as capital. A tenant for life may lease mines, whether new or open, for sixty years, under the Settled Land Acts. And he has wide powers thereunder as to the rents and royalties he may reserve; but he cannot reserve a varying dead rent. And the Court may authorise him to grant mining leases for longer terms, or on other conditions. The obligation to capitalise a part of the rent is similar to that under the Settled Estates Act, 1877. Trustees have no *primâ facie* power to grant mining leases (*Wood* v. *Pattison*, 1847, 10 Beav. 541). The Commissioners of Woods may lease Crown mines for sixty-three years, under the Acts 10 Geo. IV. c. 50, s. 22, and 36 & 37 Vict. c. 36, s. 4. The Prince of Wales may lease Duchy mines for thirty-one years, under the Duchy of Cornwall Management Act, 1863. The Admiralty may lease Greenwich Hospital mines for forty-two years, under the Greenwich Hospital Act, 1865. Church mines may be leased under the Ecclesiastical Leases Acts, 1842 and 1858. Mines belonging to the Universities of Oxford, Cambridge, and Durham, and every college therein, and to the Colleges of Winchester and Eton, may be leased under the University and College Estates Act, 1858. Mines belonging to charities may be leased under the Charitable Trusts Acts, 1853 and 1855.

Contracts.—A contract to sell or lease land will generally include the mines and minerals. A contract by the sole owner of a mine is within sec. 4 of the Statute of Frauds. So in the case of a co-owner as to his share. So in the case of an ordinary partner, unless the mines are held in trust for the undertaking generally. And in the latter case neither sec. 4 nor sec. 17 applies. The vendor, under a contract to sell land generally, cannot usually enforce it, if the mines have been worked, or if a third person is entitled to work them. The position will, however, be different, if the purchaser has known of the working. And in dealings with copyhold lands, or lands where the local mining customs prevail, the purchaser will be presumed to know the general or local law. Fraud, or even concealment, is frequently a bar to enforcing a contract. And so is delay. Having regard to the fluctuating character of mining property, delay is of much greater consequence than in other cases. Under an agreement for a lease, to contain "all usual, customary, and mining clauses," the lessor is entitled to have a proviso inserted for re-entry on breach of covenant to pay rent; but not on breach of any other covenant, or on any other event. Fraud may entitle the injured party to have his contract set aside; but, having regard to the speculative character of mining property, he must be prompt in asserting his rights.

Sales.—A mine or quarry is properly the subject-matter of exception, and not of reservation. A conveyance of land is *primâ facie* a conveyance of the entire solum from the surface down to the centre. But a conveyance under the Railways Clauses or Waterworks Clauses Act does not include mines, unless they are expressly mentioned. And when a street becomes vested in an urban authority, under the Public Health Act, 1875, they do not acquire the ownership of the mines.

Leases.—A lease of lands which happen to contain mines differs from a lease which embraces no other property than mines. In the former case, if the mines are new, the lessee is *primâ facie* disentitled to work. In the latter case, although they are new, he is *primâ facie* entitled to work. But

every mining lease should give the lessee express liberty to work. The right of instroke is the right of conveying minerals from the demised mine to the surface through a pit in an adjoining mine. The right of outstroke is the right of conveying minerals from an adjoining mine to the surface through a pit in the demised mine. Having regard to the expense of sinking, the importance of these rights is obvious. The lessee of a mine is entitled *primâ facie* to work by instroke. The lessee of a mine, who is not also lessee of the shaft and of the means of communication between the shaft and the boundary, is not entitled *primâ facie* to work by outstroke. But he may work by outstroke, if he is also the lessee of the shaft and of the means of communication between the shaft and the boundary. A lessee is entitled to use the demised mine for draining or ventilating an adjoining mine by natural means. In mining leases a dead rent and a royalty are usually both reserved. In this way the lessor secures himself, whether the mine proves unproductive or productive. Where a dead rent is reserved, it is usually payable under all circumstances. There are different kinds of royalties. One is a tonnage royalty; another is an acreage rent; another is a footage rent—that is to say, a rent for every foot thick per acre; and another is a sliding scale rent. Mining leases usually contain an "average" or "shorts" clause; enabling the lessee, in the event of his failing in any year to work up to the dead rent, to make up the deficiency in any subsequent year, or any subsequent specified years. A lessee is not bound *primâ facie* to sink pits in order to get the minerals. And an intention to bind him must be clearly shown to exist. A covenant to "win" a mineral means *primâ facie* to reach it, and enable it to be continuously worked. A lessee is not obliged to work in the absence of a covenant to do so. But a lessee who has covenanted to work constantly, and who discontinues the working, is liable on the covenant, although he pays the dead rent. And a lessee who has covenanted "to carry on, get, and work" a mine is not entitled to abandon it. In a covenant to work so long as the mine is "workable," the word "workable" probably means workable without serious loss over a considerable time. A covenant to work "in a proper and workmanlike manner" does not mean *primâ facie* in such manner only as shall be most advantageous for the lessor. A covenant to "leave" pillars at the end of the lease precludes the lessee in the meantime from removing them. A lessee is not entitled *primâ facie* to artificially conduct water from an adjoining mine into the demised mine. But he cannot, in the absence of covenant, be compelled to take any active step to prevent the mine from being drowned. A lessee who removes a barrier between the demised mine and an adjoining mine is *primâ facie* guilty of waste. Specific performance cannot be obtained of a covenant to work a mine, or to work a mine in a particular manner, or to repair. Nor, in general, can any such covenant be indirectly enforced by injunction. Independently of any provision, a distress will lie on non-payment of a royalty as well as on non-payment of a dead rent. The common clause in a mining lease giving a power of distress over adjoining property as well as the demised property is binding as against assignees with notice; and does not make the lease a bill of sale. The provisions of the Conveyancing Acts restricting the right of forfeiture for breaches of covenant do not extend to a clause against assigning, etc., or to a clause for forfeiture in bankruptcy, or to a clause for allowing the lessor to have inspection; and they do not apply in the case of non-payment of rent. Having regard to the fluctuating character of mining property, the lessor must in all cases be prompt in enforcing a right of re-entry.

Licences.—A licence to dig minerals confers no estate in the mine containing them. Nor does it confer any estate in the minerals before they are gotten. It merely authorises an act which is *primâ facie* unlawful. However, a licence to dig minerals, coupled with a grant to carry them away, is a profit *à prendre*, an incorporeal hereditament lying in grant. A licence to dig minerals, coupled with a grant, may be limited in fee or to personal representatives; and may be granted to persons not named in conjunction with persons named. A licensee, as such, is not rateable. A bare licence may be created by parol. It confers no interest in the minerals authorised to be dug even after they have been dug; and it is usually revocable. A licence to dig minerals, coupled with a grant, must, to be legally effectual, be created by deed. It gives to the licensee the right of property in such minerals as he gets, when by the act of getting he has converted them into chattels. It may be assigned. It may be transmitted by will, or may devolve on intestacy. And it is irrevocable. The licensee of a right to dig minerals, although coupled with a grant, has not *primâ facie* the exclusive right to dig. The licensor may *primâ facie* himself also dig, or authorise other persons to do so. A licensor cannot, however, disturb the licensee in his operations "when and where he is carrying them on." Nor can a licensor do any act which will defeat the known objects of a non-exclusive licensee in applying for his licence. An exclusive licence will not be inferred from language which is not clear. A power of distress is inapplicable to the subject-matter of a licence as such; and should be expressly provided for, if such be the intention. And so in the case of a proviso for re-entry. The provisions of the Conveyancing Acts restricting the right of forfeiture apply to mining licences as well as leases.

Bankruptcy and Death.—The bankruptcy of a partner operates as a dissolution. Ordinary mining partnerships do not in this respect differ from other kinds of partnership. A person who carries on mining operations may be a trader in the sense that such operations have always been regarded as a species of trade. But, whether he is a trader within the meaning of the Irish Bankruptcy Acts, depends upon the circumstances of the case. Under the English Bankruptcy Acts the circumstances are immaterial, as the Act of 1883 abolished the distinction between traders and non-traders. The death of a partner operates as a dissolution. Dower may be due of mines opened during the coverture, but cannot be due of mines not so opened. On the death of a mere co-owner the share devolves as real estate. The result is the same on the death of a partner in the working, who is a mere co-owner of the land. On the death of an ordinary partner, the share devolves as personal estate. Where mines are vested in trustees in trust for the members according to their shares, the interest of each member may be bequeathed to a charity. Unpaid instalments of consideration money in the nature of rent devolve upon the heir. Ore is analogous to money, and a reservation of ore will go to the remainderman as money. Mining renders were always personalty under the Mortmain Acts. Minerals worked by a tenant for life devolve upon his personal representative. Machinery erected to work a colliery will usually devolve as personalty.

Support—Generally.—The most difficult branch of the law of mines is that dealing with support. Support may be lateral or vertical; and the two rights depend upon the same principles. Support may be support for land in its natural state; or support for land artificially burdened by a building or canal, or artificially weakened by an excavation. Between the rights to these two kinds of support there is a wide distinction in principle. The right of support for land in its natural state is an incident to the land

itself. But it is not a right of property in the same sense as the right to prevent a trespass. The property in the minerals, for example, belongs exclusively to the mine owner; and he may remove the whole of them, if for the natural support which they would have afforded he substitutes artificial support. The right of support for land in its non-natural state is a mere easement. Although, however, the two rights stand upon different footings as to the modes of acquiring them, the character of the rights when acquired is in each case the same. The right of support is neither affected by the nature of the strata, nor by the difficulty of propping up the surface. Degrees cannot be measured out to which the right will extend. Similarly the extent of the right is not limited by the land of the immediately adjoining owner. Again, the right of support is independent of the comparative values of the substance giving and the substance receiving the support (*Humphries* v. *Brogden*, 1850, 12 Q. B. 739). The right of support is, however, only a right to prevent one's neighbour from removing the substance giving the support subsequently to the existence as a separate tenement of the substance receiving the support. And where a natural substance constitutes a support, the right is merely a right to prevent one's neighbour from actively interfering to remove the support. The neighbour cannot be made liable for his mere passive omission to prevent the operation of natural causes. The right of support is not infringed until subsidence actually takes place, which may be, and usually is, a considerable time subsequently to the working (*Backhouse* v. *Bonomi*, 1861, 9 H. L. 503). It follows that each fresh subsidence caused by the removal of the support creates, as it occurs, a fresh cause of action (*Darley Main Colliery Co.* v. *Mitchell*, 1886, 11 App. Cas. 127). And the principle of this case applies as well where the subsidence is a continuous process as where it occurs by "fits and starts" (*Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503). The right of support is not infringed unless the subsidence is substantial. Apparently, however, the right is infringed where the subsidence is substantial, although the damage is inappreciable (*A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301).

Support—Primâ Facie Rights.—Every owner of land in its natural state has a *primâ facie* right to support, lateral as well as vertical (*Humphries* v. *Brogden*, 1850, 12 Q. B. 741, 742). Accordingly, where there is a grant of land in its natural state, with an exception of the mines, and no provision is made with respect to support, the grantee is entitled to support as incident to his grant. And where there is a grant of land in its natural state by way of conveyance in fee-simple, with an exception of the surface, the law is the same (*Davis* v. *Treharne*, 1881, 6 App. Cas. 460). And the law is the same where the grant takes the form of a lease for years; although in this case the presumption may be more easily rebutted (*ibid.*). A severance of title under an Inclosure Act stands upon the same footing as regards support, as a severance effected by a voluntary instrument. In the case, however, of minerals under wastes the law is different. The lord of a manor is entitled, in working minerals under the wastes, to withdraw support from the surface, provided he leaves sufficient common for his commoners. Where land has been artificially burdened by a building, no right of support, lateral or vertical, exists *primâ facie* for the building. And the same principle applies to the case of a railway, roadway, or canal (*Caledonian Rwy. Co.* v. *Sprot*, 1856, 1 Paterson, 633; 2 Macq. 449; *Dalton* v. *Angus*, 1881, 6 App. Cas. 753, 772). A similar principle applies where the land has been artificially weakened by excavations. And for this purpose it is immaterial whether the excavations are made by the owner

of the land; or by a third party; or even by the defendant, if entitled to make them (*Birmingham* v. *Allen*, 1877, 6 Ch. D. 284, 288, 293, 296; *Williams* v. *Bagnall*, 1866, 15 W. R. 272, 276). However, where land which has been built upon is damaged through the withdrawal of its support, its owner will, if he can prove that it would have been damaged even in its natural state, be entitled *primâ facie* to a remedy. And in such a case he will be entitled to recover in respect of the injury to the building, as well as the injury to the land (*Brown* v. *Robins*, 1859, 4 H. & N. 186). It is probable that negligent working, if the cause of injury, involves liability, even in the case of land in its non-natural state.

Support—Variation of Primâ Facie Rights.—The right of support for land in its natural state may be excluded by contract, whether express or implied (*Love* v. *Bell*, 1884, 9 App. Cas. 289, 297). An owner of land in its natural state, whose right of support is excluded by contract, may nevertheless have a remedy, if the damage which he sustains has been caused by the working of minerals not the subject of that contract. Where a covenant as to non-liability for damage, although nominally such, is in effect a grant of a right to disturb the surface, the burden of it runs with the land (*Rowbotham* v. *Wilson*, 1860, 8 H. L. 348). The liability for damage under a contract excluding the right of the surface owner to support runs with the land (*Aspden* v. *Seddon*, 1876, 1 Ex. D. 496). The right of support for land in its natural state may also be excluded by custom, if it is a part of the custom that compensation should be made for all damage. And it is submitted that the same is the law, although it is no part of the custom that such compensation should be made; notwithstanding *Hilton* v. *Granville*, 1845, 5 Q. B. 701. And prescription and custom probably stand upon a similar footing in this respect. There is no distinction between freeholds and copyholds as regards a customary or prescriptive right to withdraw support. Even if a custom to withdraw support from copyholds without making compensation is bad, it does not follow that such a custom would be bad as regards wastes (*Gill* v. *Dickinson*, 1880, 5 Q. B. D. 159). A right of support for land in its non-natural state may be acquired by express grant. It may also be acquired by implied grant. If, for instance, the weight caused by a building be upon land at the time when such land is severed from the adjoining land, there is *primâ facie* an implied grant of the right of support for such building (*Caledonian Rwy. Co.* v. *Sprot*, 1856, 1 Paterson, 633; 2 Macq. 451). So where land is severed from the adjoining land for a particular object; as, for example, the construction of a building, railway, canal, roadway, or sewer; and such object is known to both parties at the time of the severance; there is *primâ facie* an implied grant of a reasonable degree of support for the due execution of that object (*Caledonian Rwy. Co., supra; Elliot* v. *N.-E. Rwy. Co.*, 1863, 10 H. L. 357, 362; *L. & N. W. Rwy. Co.* v. *Evans*, [1893] 1 Ch. 24, 25). And even if it be merely shown to have been within the contemplation of the parties to a purchase that an artificial weight might at a then future time be placed upon the land purchased, a grant will *primâ facie* be implied of a reasonable degree of support for that weight (*Berkeley* v. *Shafto*, 1863, 15 C. B. N. S. 79). There can, of course, be no implied grant, except by a person who is in fact a grantor, and to the extent of his power to make the grant. If, for example, A. purchases from B. a piece of land for the purposes of a railway; and the railway also requires support from the land of C., which adjoins, whether laterally or vertically; A. *primâ facie* acquires no right of support against C. And where a surface owner is himself only entitled to support for the land in its natural state; and the surface is purchased for the

purposes of a railway; the purchaser does not purchase by implication the right of support for the railway (*Pountney* v. *Clayton*, 1883, 11 Q. B. D. 840, 841). It may, however, be that, according to the true construction of a statute, a right of support is acquired, not merely against the person whose land is actually purchased, but as against another person whether owning laterally or vertically. A right of support acquired under an implied grant may be lost by omitting to keep the subject-matter in proper repair. Where, however, a right of support is acquired under an implied grant; and the dominant owners subsequently increase the weight; although they do not acquire a new right, they do not lose the old one (*G. W. Rwy. Co.* v. *Cefn, etc., Co.*, [1894] 2 Ch. 157). As in the case of land in its natural state, so in the case of land in its non-natural state, the right of support may be excluded, expressly or by implication. The question is in every case one of construction.

Support—Construction—Railways and Waterworks Clauses Acts.—A large number of cases have come before the Courts involving the right of support, and raising questions of construction. Some of these have arisen under instruments *inter partes* and Inclosure Acts. Others have arisen under old Railway and Canal and similar Acts. And others again have arisen under the Railways Clauses Consolidation Act, 1845, and similar Acts. It would serve no useful purpose to refer more particularly to cases of the two former classes. But cases of the latter class have a wide application, and deserve more particular mention. The mining enactments of the Railways and Waterworks Clauses Acts were intended to create a "special code," by which alone the relations of in the one case railway proprietors, and in the other case waterworks proprietors, to adjoining landowners were to be governed. Railway or waterworks proprietors were not, in the first instance, in purchasing the surface, to be obliged to make compensation in respect of the mines. They were to be at liberty, if they thought it likely that the mines might not be worked for an indefinite period, to postpone making compensation until the necessity arose (*G. W. Rwy. Co.* v. *Bennett*, 1867, L. R. 2 H. L. 38, 40, 42; *Holliday* v. *Wakefield*, [1891] App. Cas. 91, 102). The doctrine of implied grant has, therefore, no place in cases arising under these provisions. Nor has the principle of *Brown* v. *Robins*. In cases arising thereunder it is immaterial that the surface would have subsided, if it had been left in its natural state. The provisions of the Acts may apply where the right acquired is a mere right to make and maintain works on land which remains the property of the landowner (*L. & N.-W. Rwy. Co.* v. *Ackroyd*, 1862, 31 L. J. Ch. 588). On the other hand, the provisions will apply where the right of property acquired includes a right, not merely in the surface, but in certain specified mines (*In re Gerard and L. & N.-W. Rwy. Co.*, [1895] 1 Q. B. 459). The provisions of the Acts apply not merely to mines under the lands purchased, but to laterally adjoining mines also. They also apply although there has been a previous severance of the surface and the mines (*Pountney* v. *Clayton*, 1883, 11 Q. B. D. 820). The Acts in terms apply to mines lying under the works, or within the "prescribed distance"; or, where no distance is prescribed, forty yards therefrom. It is probable that mines outside the prescribed distance are subject to common law doctrines. The provisions of the Acts apply to lands sold as "superfluous" as well as to lands retained (*Pountney* v. *Clayton*, *supra*). The Acts require the owner or lessee of mines to give thirty days' notice of his intention to work. The giving of a notice does not preclude a subsequent notice as to a different mineral. A notice need not be acted upon at once, but it must be a *bond*

fide notice. A company are not bound to any fixed period within which they must give a counter-notice to work (*Dixon* v. *Cal., etc., Cos.*, 1880, 5 App. Cas. 820). There is no obligation on a company to make compensation. They may, if they prefer, allow the working to proceed (*Holliday* v. *Wakefield*, [1891] App. Cas. 87, 88, 97). Compensation for not working can rarely be claimed at the time of the purchase of the land. It is claimable, when, in the ordinary course of the workings, they are approached so nearly as to be immediately worked if they proceed (*Holliday* v. *Wakefield*, *supra*). When mines are in lease, the lessee is the person entitled to give the notice. But the reversioner may obtain compensation according to the extent of his interest, as well as the lessee (*Smith* v. *G. W. Rwy. Co.*, 1877, 3 App. Cas. 165). When the reversion is settled, the compensation is distributable between the persons entitled according to their interests (*In re Barrington*, 1886, 33 Ch. D. 523). A mine owner left at liberty to work must, under the express terms of the Acts, work in a proper and usual manner. The Acts allow an owner, whose mines lie "on both sides," to make mining communications. But it is necessary that such mining communications should be actually under the works; and it is also necessary that the mines should lie on both sides (*Mid. Rwy. Co.* v. *Miles*, 1885, 30 Ch. D. 634; 1886, 33 *ibid.* 632). The Acts entitle the owner or lessee of mines to compensation for damage by severance (*Mid. Rwy. Co.* v. *Miles*, *supra*; *Holliday* v. *Wakefield*, [1891] App. Cas. 84, 95, 98). The Acts empower companies to inspect mines for the purpose of ascertaining whether sufficient support is left. The Waterworks Clauses Act preserves to the mine owner his common law right to an action, in case his mine is injured by the escape of the water. The Public Health Amendment Act, 1883, is an adaptation of the Waterworks Clauses Act to sewers, and works of drainage, lighting, and water supply. It, however, applies to mines outside the "prescribed distance" as well as to those within it.

Support—Prescription.—The right of support for land in its non-natural state may be acquired by an adverse enjoyment for twenty years, as well as by express grant or implied grant. But in such a case it is necessary that the servient owner should have been competent to make a grant, and should have known or been in a position to know that some artificial weight existed; and that the dominant owner should have acted without deception or concealment (*Dalton* v. *Angus*, 1881, 6 App. Cas. 740). The right of support for land in its non-natural state cannot, however, be acquired by prescription if the person claiming it is disentitled to support for the land in its natural state (*Rowbotham* v. *Wilson*, 1860, 8 H. L. 348, 365). And, in order that such a right may be acquired, the dominant owner must not have acted unlawfully or carelessly. And the dominant owner may lose his right by omitting to keep the subject-matter in repair.

Support—Brine-Pumping.—The dislodgment of salt by brine-pumping usually causes surface subsidence of a destructive kind, in respect of which the common law remedy is either non-existent or useless. The Brine-Pumping (Compensation for Subsidence) Act, 1891, however, makes any district, in respect of which its provisions are applied, subject to a special law; under which a compensation fund is raised by a rate levied on all the brine-pumpers within it.

Support from Water.—The right of support from water depends upon the right of the other party to obstruct or divert it. The right of support from subterranean water cannot usually, but may be sometimes, claimed by implied grant (*Elliot* v. *N.-E. Rwy. Co.*, 1863, 10 H. L. 333; *Popplewell* v. *Hodkinson*, 1869, L. R. 4 Ex. 248).

Support—Remedies.—The remedy for the withdrawal of support has been decided to be against the owner who originally worked, and not against the owner at the time of the subsidence (*Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165). In the case of wrongful workings by different owners, the remedy is against all (*Darley Main Coll. Co.* v. *Mitchell*, 1886, 11 App. Cas. 146). When a lessee withdraws support, there is no remedy against the lessor, unless he has authorised it. An ordinary action for damages usually lies for infringing the right of support. An injunction can also be had, if actual damage has already occurred, or if damage is "imminent and certain." The Statute of Limitations bars the remedy after six years from the time of actual damage. The death of the wrong-doer may also be a bar (*Phillips* v. *Homfray*, 1883, 24 Ch. D. 439, 449).

Sinking Pits, etc., Quarrying and Excavating Subsoil.—Where mines are severed from the overlying surface, the mine owner is entitled *primâ facie* to go upon the surface, and dig pits, and get the minerals. He may also *primâ facie* erect machinery on the surface for the purpose of working the mines, and lay minerals or rubbish thereon. It is probable that the Crown, as the owner of mines royal, has similar rights. The mine owner must not, however, use the surface unnecessarily; and he must act *bonâ fide*. Where a man tips spoil upon a piece of land without having any right so to do, the measure of damages is not the actual damage sustained by the injured party. It is the value of the land used for the purposes for which it has been used (*Whitwham* v. *Westminster Brymbo, etc., Co.*, [1896] 1 Ch. 894; 2 Ch. 538). Statutory rights of searching for and working minerals, and using the surface for that purpose, are given under the Inclosure Acts; to the Duke of Cornwall under the Act 7 & 8 Vict. c. 105; and to the Crown under the Cornwall Submarine Mines Act, 1858, and the Crown Lands Act, 1866. A mine owner, who sinks a shaft, is bound *primâ facie* to keep it properly fenced. Where mines are severed from the overlying surface, if the process of getting the minerals would, as in the case of quarrying, be destructive of the surface, the mine owner cannot *primâ facie* get them (*Hext* v. *Gill*, 1872, L. R. 7 Ch. 699). Where, however, a railway or waterworks company purchase land under the Railways Clauses Consolidation Act, 1845, or the Waterworks Clauses Act, 1847, but do not purchase the mines; and the land contains stone ordinarily got by quarrying; the landowner is entitled to get it in that way, although the result may be destructive of the surface (*Midland Rwy. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Ruabon Brick, etc., Co.* v. *G. W. Rwy. Co.*, [1893] 1 Ch. 427). Where land is sold for the erection of a house, with an exception of the minerals, the grantee may *primâ facie*, notwithstanding the exception, dig out the foundations of his house (*Robinson* v. *Milne*, 1884, 53 L. J. Ch. 1070).

Roadways.—Where there is an unlimited grant of a way, the grantee may make any kind of way he pleases. Where the grant is clearly limited, the grantee cannot make any other kind of way than that which has been granted. Where the grant is not clearly limited, the kind of way which may be made depends upon the circumstances and necessities of the case. The purposes for which a way may be used is determinable in a similar manner. A way of necessity arises by implied grant; and mining rights of way are sometimes claimed under this doctrine. A user by prescription of a right of way of a particular kind, or for a particular purpose, will not justify a user of a way of any other kind which is more onerous, or for any other purpose which is more onerous. A mine owner may be entitled to damages for severance when his mining communications have been severed under compulsory powers. An ordinary action for damages will usually lie

for obstructing a right of roadway; and the dominant owner may also in general have an injunction. An ordinary action of damages will also usually lie for using a right of way without the right to do so; and the measure of damages in such a case is the value of the land for the purposes for which it has been actually used (*Whitwham* v. *Westminster Brymbo, etc., Co.*, [1896] 1 Ch. 898, 899; 2 *ibid.* 538). The injured party will also be in general entitled to an injunction. The death of the wrong-doer may, however, be a bar to the remedy (*Phillips* v. *Homfray*, 1871, L. R. 6 Ch. 770; 1883, 24 Ch. D. 444, etc.).

Water—Using and Abstracting.—A riparian owner may use a stream for the purpose of working machinery connected with his mines, or as a means of transport for his minerals. But he may not *primâ facie* in undermining tap the bed of the stream, or by any other act sensibly interfere with the common enjoyment. A man may acquire by grant, or prescription, or custom larger rights in respect of surface water than he has at common law. Water which does not flow in a defined channel differs from water which does. In the former case, any person through whose property the water flows may *primâ facie* abstract or divert it at pleasure. *A fortiori*, the same principle applies to percolating water. And not merely is a man free from liability who drains away percolating water which would otherwise have found its way into his neighbour's property. He is equally free from liability if, as the result of his operations, percolating water ceases to be retained in his neighbour's property (*Acton* v. *Blundell*, 1843, 12 Mee. & W. 324; *Ballacorkish, etc., Co.* v. *Harrison*, 1873, L. R. 5 P. C. 49). And if a man is free from liability on other grounds, he does not become liable merely because his motive is malicious (*Bradford* v. *Pickles*, [1895] App. Cas. 587). A man may, however, acquire by grant the right to prevent his neighbour from abstracting percolating water. Where the presence of water is due to artificial causes, any person through whose property it flows may *primâ facie* abstract it at pleasure. Rights in such water, to the prejudice of the natural rights of other persons, may, however, be acquired by grant, and frequently by prescription. As regards prescription, however, the enjoyment must be as of right, and neither *vi*, *clam*, nor *precario*. If, therefore, a flow of water has its origin in a man discharging it from his property for his own convenience, the enjoyment of it will be considered to be precarious, and no rights in respect of it can be acquired as against him by prescription (*Arkwright* v. *Gell*, 1839, 5 Mee. & W. 203; *Wood* v. *Ward*, 1849, 3 Ex. Rep. 748; *Gaved* v. *Martyn*, 1865, 19 C. B. N. S. 732).

Water—Fouling.—A riparian owner may not *primâ facie* foul natural surface water. But he may acquire the right to do so under grant, prescription, or custom. A man may not foul water which flows in an undefined channel, or percolating water, or water flowing in an artificial channel. And the Rivers Pollution Prevention Act, 1876, contains provisions for preventing the fouling of streams by refuse from quarries, or solid matter from mines.

Water—Discharge and Escape.—A man has no right *primâ facie* to be an active instrument in discharging water from his own property upon the property of his neighbour. A higher mine owner is not, therefore, entitled to conduct water to a mine upon a lower level by artificial pipes or channels (*Baird* v. *Williamson*, 1863, 15 C. B. N. S. 390, 391), and the higher owner cannot excuse himself on the ground that he has acted without negligence, and in the due working of his own mine. A right may, however, be acquired by grant, or by prescription, to interfere actively in discharging water upon the land of another person. *Primâ facie*, a man is free from

liability if water, which is present in the ordinary course of nature upon, or within, or beside his property, escapes from or through his property by the mere force of gravitation (*Rylands* v. *Fletcher*, 1868, L. R. 3 H. L. 338, 342). And if the workings of a higher mine owner are usual, he will be free from liability, although, as the necessary result, water which had not previously so descended descends by gravitation into a lower mine (*Smith* v. *Kenrick*, 1849, 7 C. B. 515). So in the case of surface water produced by rainfalls (*Wilson* v. *Waddell*, 1876, 2 App. Cas. 95). And if the higher owner makes a drift in his mine in the ordinary course of working it, and water flows along such drift and floods his neighbour's mine, the higher owner will not *primâ facie* be liable (*Baird* v. *Williamson*, 1863, 15 C. B. N. S. 376, 390, 391). Where, however, the outlet into the lower mine was made by the higher owner, he will be liable. Not merely is a man, who uses his property naturally, generally free from liability in respect of any ensuing damage. Where no actual damage has ensued, he is also free from liability, although his user be non-natural (*West Cumberland, etc., Co.* v. *Kenyon*, 1879, 11 Ch. D. 782). Where, however, as the result of a man's non-natural mode of user, water which had previously found its way by gravitation into his neighbour's mine finds its way in greater quantities, a cause of action arises. And a higher owner will not be justified in tapping the bed of a river (*Crompton* v. *Lea*, 1874, L. R. 19 Eq. 115). If a person, upon whose land it would not naturally come, brings upon his land and collects and keeps there so dangerous an element as water, he does so at his peril, and he is *primâ facie* answerable for all the damage which may result from its escape (*Rylands* v. *Fletcher*, 1868, L. R. 3 H. L. 330). And a similar principle applies where a higher owner substitutes a new for the old course of a stream (*Fletcher* v. *Smith*, 1877, 2 App. Cas. 787). Sometimes, however, in such cases a freedom from liability is created by statute (*Dunn* v. *Birmingham Canal Co.*, 1872, L. R. 7 Q. B. 244; 8 *ibid.* 42; *In re Dudley*, 1881, 8 Q. B. D. 86). But the principle of *Rylands* v. *Fletcher* applies to all cases of waterworks constructed under Acts incorporating the Waterworks Clauses Act, (s. 27). Where a man discharges water from his mine upon the property of his neighbour without having the right to do so, the latter may usually have an action for damages, and he may also in general have an injunction.

Air.—A man has no right *primâ facie* to make an air-way through his neighbour's property for the purpose of ventilating his own. And apparently, although he makes no such air-way, a man has no right *primâ facie* to be an active instrument in ventilating his own property by means of his neighbour's. On the other hand, a man is *primâ facie* free from liability if his own property is ventilated by means of his neighbour's through the mere operation of natural causes (*Powell* v. *Aiken*, 1858, 4 Kay & J. 343; *Bowser* v. *Maclean*, 1860, 2 De G., F. & J. 415, 421; *Jegon* v. *Vivian*, 1871, L. R. 6 Ch. 759).

Smoke and Fumes.—A man has no right to burn bricks on his land, although made of his own clay, if a nuisance would be thereby created (*Walter* v. *Selfe*, 1851, 4 De G. & Sm. 315, 324). However, the question whether a nuisance is created is one of fact in each particular case. Similar principles are applicable in the case of ironworks, copperworks, coke-ovens, cement works and chalkworks or limeworks.

Stannary Courts.—The stannary jurisdiction is peculiar to the counties of Cornwall and Devon; and is exercised by the County Courts to which it was transferred under the Act 59 & 60 Vict. c. 45. The jurisdiction is, so far at least as respects Cornwall, an ancient immemorial jurisdiction. The

Courts possess both a common law and an equity side. The general common law jurisdiction in Cornwall is exercised in respect of personal actions under certain conditions in which one or both of the parties are miners. The general common law jurisdiction in Devon is exercised in respect of questions in which miners in Devon are concerned; but only in respect of matters relating to mines. The general equitable jurisdiction is exercised in respect of metals and metallic minerals in Cornwall and Devon. Proceedings are commenced by plaints. The Court may, under the equitable jurisdiction, grant specific performance of contracts, and make declarations of forfeiture for non-working. It may also restrain the working of any mine in a manner contrary to custom or covenant. It may also summarily rectify the register of a company. And the Court exercising the winding-up jurisdiction has, for that purpose, all the powers of the High Court. The Court has also a special jurisdiction to decide questions arising out of the rights of working given to the Duke of Cornwall under the Act 7 & 8 Vict. c. 105. In personal actions it is probable that the jurisdiction of the Stannary Courts is exclusive. The general equity jurisdiction of the Stannary Courts appears to be also exclusive. The jurisdiction to summarily rectify the register of a company may be exercised by the High Court or the Stannary Court, at the option of the applicant. A petition to wind up a company formed for working mines within the Stannaries must usually be presented to the Stannaries Court.

Tin Bounding.—The custom of tin bounding is peculiar to the counties of Cornwall and Devon. The right of tin bounding in Cornwall may be claimed either in respect of land of a private person, or in respect of land within the seventeen assessional manors. The right of bounding is obtained in the following manner. Any working tinner may give notice to the lord of the soil of his desire to work any tin mine in a piece of waste land. The lord may then himself work; and, if he does not do so, the tinner may at the next Stannary Court proclaim the bounds which he desires to work. Further proceedings are then taken in the Stannary Court, and possession may ultimately be delivered to the tinner. The estate of a bounder is in Cornwall in the nature of a chattel real. The bounder is usually obliged to render the lord a portion of the soil, called the dish or toll tin. The bounder must, in order to preserve his rights, annually renew the bounds. Tin bounds may be the subject of assignment, settlement, or demise. Bounders are entitled by custom to the free use of the water over the district within their bounds, and to the right of diverting that water into other streams. Indeed, "streaming for tin" is almost a necessary part of their operations. Bounders are also entitled by custom to wash their minerals in the water within their bounds, and to send down the stream sand and other stuff dislodged in the process of the workings. The validity of the custom of tin bounding in Cornwall has been judicially doubted, but probably on insufficient grounds. In Devonshire any tinner may dig tin, wherever it may be found, with certain exceptions. The estate of a bounder is in Devonshire an estate in fee-simple. The tenth part of the profit of tin worked in any meadow, pasture, or tillage belongs to the lord and the tenant in occupation in equal shares. Tin bounds in Devonshire may be the subject of conveyance or devise. Bounders are entitled by custom to carry water to and from their works. So far as the custom of tin bounding in Devonshire is to take the soil of another person without compensating him, it is invalid.

The Cost Book System and Cornish and Devonshire Companies.—Cost

book companies chiefly exist in Cornwall and Devon. They are, however to be met with in other parts of England, in Wales, in Ireland, and even in the colonies. For the purpose of forming a cost book company, a licence to search for minerals is usually obtained in the first instance. A meeting of the adventurers is then held, who decide on the constitution of the concern. The majority of cost book companies at the present day are worked according to expressly defined rules. A Stannary company, not being a cost book company, may be registered under the Companies Act, 1862; and a cost book company (whether within or without the Stannary limits) is equally capable of registration. Registration is, however, purely optional in the case of Stannary companies. Every limited Stannary company is bound to keep a register of mortgages; and a copy of all mining grants must be filed. A register of members is also required to be kept by every registered Stannary company; and every unregistered Stannary company is bound to file a true copy of its written rules, if any. In the intervals between meetings the purser acts generally for the adventurers, and keeps the accounts; and the purser of every Stannary cost book mine is bound to enter the accounts in the cost book once at least in every sixteen weeks. The purser of a Stannary cost book mine is bound to convene a meeting once at least in every sixteen weeks; and, independently of statute, the purser of a cost book company (whether within or without the Stannaries) convenes meetings every two or three months. After accounts have been laid before a meeting of a Stannary cost book company, they must be printed. Any member of a cost book company may obtain an account against the others, and without seeking a dissolution. In the case of Stannary companies, a statutory action to recover calls may be brought in the name of the purser. Independently of statute, a cost book company, whether within or without the Stannaries, is usually obliged to induce a creditor to sue a defaulter in respect of calls. A cost book company has a lien on the shares of a defaulter in respect of calls, and may enforce such lien by sale. A Stannary company has also a statutory power to forfeit shares for non-payment of calls. The "wages" of miners are a first charge on the assets of a Stannary company; and there are various statutory provisions for enforcing payment of wages, and for ensuring that the proper amounts are paid (Stan. Act, 1887). The purser has authority *primâ facie* to bind the members by dealings on credit; and usually, therefore, a supplying creditor may bring an action against an individual member to enforce the obligation. The purser cannot, however, *primâ facie* bind the members by borrowing money; and *à fortiori* he cannot *primâ facie* bind them by means of negotiable instruments. A member of a cost book company may transfer his share without the consent of the other members, and such transfer does not operate to dissolve the company. In the great majority of cases a contract to transfer may be entered into by parol, although a memorandum is usually made; and so in the case of an actual transfer. A member of a cost book company may also relinquish his shares to the company, and insist upon the company accepting them; and an account is then taken and the balance paid. The bankruptcy of a member of a cost book company will not operate to dissolve a company; and so in the case of death. When a member dies, his interest devolves as personal estate; and he may bequeath his interest to a charity. There are statutory provisions enabling a Stannary company to sell its property, or to amalgamate with another company. Stannary companies may be wound up in the Stannary Courts or in the High Court; and there are statutory provisions for dealing in a

winding-up with wages of miners, mine-club funds, disputed debts or claims, and interpleader. In the ordinary Courts the existence and nature of the cost book custom must be proved.

Gloucestershire Rights and Customs.—The Hundred of St. Briavels in the county of Gloucester includes the Forest of Dean and several of the surrounding parishes. Almost all the mines and quarries of every description throughout the Hundred belong to the Crown. The interests of the Crown are represented by the "Gaveller" of the Forest, or his deputy. The mines of coal and iron and the quarries of stone throughout the Hundred, so far as they belong to the Crown, are subject to the rights of the "free miners" to have "gales" and leases granted to them. By "free miners" is meant all male persons born and abiding within the Hundred of the age of twenty-one years and upwards, who shall have worked a year and a day in a coal or iron mine within the Hundred. There are also free miners so far as relates to "gales" and leases of stone quarries. Provisions exist for the registration of free miners; and for applications for and grants of gales. A galee possesses an interest of the nature of an estate in fee-simple. "Galeage" or dead rents, and also royalties, are usually payable to the Crown in respect of gales. The galee is obliged to keep accounts of his workings, and to make plans. Payment may be enforced by distress, or by an action for the rent. Provisions exist for granting leases connected with gale workings; and for granting leases of quarries, clay and sand; and for granting licences. Rules also exist as to workings and discontinuance of workings, and an action lies to enforce the rules. There may be a transfer or devolution of "gales." There may be a forfeiture for non-payment of rents, and forfeited gales may be regaled. Gales may also be surrendered. Provisions also exist regulating the mutual rights of private owners and free miners; both as to participation in rents, workings, and surface damage. And provisions exist regulating the mutual rights of free miners. Free miners are entitled to gales in the order of their applications. No free miner is entitled to more than three gales. No gale can be granted until the application has been published, or which may interfere with existing gales. The gaveller may settle questions as to boundaries and barriers. There is a duty not to impede other workings; to leave barriers; and to prevent the escape of water. And an action lies to enforce compliance with rules.

Derbyshire Courts Rights and Customs.—The right of property in the mines of lead ore in the king's field within the Hundred of High Peak, and in the king's field within the soke and wapentake of Wirksworth, in the county of Derby, is vested in the Crown, as part of the possessions of the Duchy of Lancaster. The right of property in the mines of lead ore in the manors of Ashford, Hartington, Peak Forest, Tideswell, Crich, Stoney Middleton and Egam, Youlgreave, and Litton, in the same county, is in the hands of various private persons. These various rights are subject to an ancient customary right in all the subjects of the realm to work the mines of lead ore on payment of certain duties. And questions relating to these rights and customs are decided in the Great and Small Barmote Courts. The jurisdictions of the Barmote Courts are exercised by the stewards or their deputies, with the assistance of the barmasters and deputy barmasters. There are prescribed times and places for holding the Courts; and there are prescribed duties for the stewards, barmasters, deputy barmasters, and grand jurors. Actions may be commenced by plaint; and there are actions of title, trespass, and debt. Every subject of the realm is entitled *primâ facie* to search for mines of lead ore in all lands within the

jurisdiction of the Court, with certain exceptions and under certain restrictions; and, if he finds a new vein, he is entitled to two "meers" in length of the vein; the Crown being entitled to the third meer. The interests of the miners are apparently freehold. The miner must pay a "freeing dish," and also "lot and cope," as mineral duties. The interest of a miner is the subject of transfer and devolution. It may be forfeited for non-payment of duties, or for trespass, or for non-working. A miner is entitled to use the surface, and to erect buildings thereon, and to exercise rights of way and water. He is also entitled to remove his buildings. If he ceases to work, he is bound to level the land and remove his buildings; and he is bound to fence. As between the miners and other miners, the right to mine is acquired by priority of finding; and the jury on a trial decide the fact of priority. If a miner commits a trespass in the mine of another person, the latter may have an action in the Small Barmote Court. Tithe ore is due by custom in Worselworth, Hartington, Egam, and Stoney Middleton; but not in Matlock or Bradbourne. A creditor in respect of a mine may recover the amount by action in the Small Barmote Court. If a person "unwaters" a mine, he may oblige the owner to deliver him a portion of the ore by way of compensation for the service.

Isle of Man.—The right of property in the mines and quarries and in the minerals (except clay and sand) in the customary estates of inheritance in the island is vested in the Crown. But the owners of such customary estates are entitled to the clay and sand. The Crown has a customary right to go upon the customary estates, and pierce the surface for mining purposes, subject to a customary liability to make compensation for damage done.

Durham and Yorkshire.—Tithe is due by custom of lead ore in the "Grass Groves" in Teasdale Forest, in the county of Durham. Tithe is also or was due by custom of lead ore in Stanhope and Wolsingham, in the same county. Tithe is also due by custom of lead ore in Arkilgarthdale, in Yorkshire.

The Colonies.—The principle that a grant of lands by the Crown will not pass gold or silver mines, unless expressly granted, applies to a grant in the colonies.

Wrongful Possession.—Possession may be recovered in respect of mines, whether open or new; and whether as part of the land generally, or as a distinct subject-matter. But a title to mines, as part of the land generally, may be acquired under the Limitation Acts. And a title to mines, whether open or new, as a distinct subject-matter, may also be so acquired; whether the person claiming them has or has not the exclusive right to the surface. Where, however, an entry into possession is wrongful, a title can in general be only required in respect of the part of which actual physical possession has been taken. Mere non-user by a mine owner, no matter for how long a time, will not give the surface owner a title to mines by prescription. A trespasser cannot, by merely having trespassed for more than twelve years, claim his neighbour's mine under the Limitation Acts. A claim to a substratum of coal cannot be had under the Prescription Act. There is a special Limitation Act as regards Duchy of Cornwall minerals.

Wrongful Abstraction.—The actual wrong-doer is not of necessity alone liable. An employer or a partner may be liable. A mortgagee is not, however, in general liable for the acts of his mortgagor. The injured party may have trover or trespass, according to his interest in the abstracted minerals. Or he may have an account. As to the measure of damages the law is in a curious position. When the plaintiff sues in trover, he may be

entitled to the value of the minerals without allowing for the expense of severing or of carriage. But where he sues in trespass, he may be obliged to allow for the expense of carriage. Where he sues for an account, the right of the defendant to an allowance depends upon whether he has acted *bonâ fide* or not. The wrong-doer is liable for consequential as well as direct damage, whether in respect of subsidence or otherwise. When the mines are in settlement, the damages recovered will be dealt with as income or corpus according as the limited owner is or is not entitled to work. The injured party may also in general have an injunction. A litigant may usually on terms obtain an order to inspect. The remedy may be lost by neglecting to take proceedings for six years; and similarly an account cannot be carried further back than six years. The Statute of Limitations does not, however, apply if there has been concealed fraud. If there has been consequential injury from subsidence, the statute appears to run, not from the date of the injury, but from the date of the trespass. The death of the wrong-doer is no bar to an action for an account.

Criminal Remedies.—There are also criminal remedies for the wrongful abstraction of minerals. And there are criminal remedies for maliciously drowning or setting fire to mines; for maliciously injuring air-ways, water-ways, shafts, etc.; and for maliciously injuring machinery.

Taxes, Duties, Rates, and Tithes.—Mines and quarries are subject to land tax. They are also subject to income tax. Provisions exist for ascertaining the chargeable value of mines and quarries assessable to income tax, the person liable, and the place of liability. Mines, like other property passing on death, are subject to estate duty. Mines and quarries of every description are liable to poor rates, and local rates leviable upon property rateable to the relief of the poor. The rateability depends on working, not on profitableness. Mines or quarries other than tin mines, lead mines, or copper mines are rateable on a different principle to that applicable to tin mines, lead mines, or copper mines. The actual profits which the occupier makes are not material for the purpose of assessment, but the convenience and situation of the property are material. The person liable is the occupier. A mere licensee is not liable. Nor is the mere grantee of an easement. The members of a cost book company, or the purser, may be liable. A galee is probably liable. The lessor of a mine other than a coal mine, who receives rent in kind, is, however, liable, and the lessee is exempt. Where a mine lies in several parishes it is rateable proportionately in each. Mineral tithes are not payable of common right, but may be due by custom.

Coal Mines Regulation Acts.—The Coal Mines Regulation Act, 1887, applies to mines of coal, mines of stratified ironstone, mines of slate, and mines of fireclay. The Act prohibits the employment below ground of boys under twelve, and of girls and women. It regulates the employment of boys below ground, and of boys, girls, and women above ground. It requires a register to be kept of boys, girls, and women employed. It requires school fees to be paid out of wages. It prohibits the payment of wages at public-houses. It regulates the payment of wages by weight. It empowers the persons employed to appoint and remove a check-weigher; and it provides for his remuneration. It prohibits single shafts, with certain specified exceptions. It provides for the division of a mine into separate parts, where the parts are worked separately. It provides for the appointment of certificated managers, and for daily supervision by managers or under-managers. It constitutes boards for appointing examiners for granting certificates of competency to managers and under-managers. It regulates the proceedings and powers of such boards. It enables rules to

be made as to examinations. It provides for the grant of certificates to successful applicants. It enables inquiry to be made into the competency of managers, and provides for the costs of the inquiry. It provides for the making of annual returns by the owners, agent, or managers of mines; for the keeping of plans of mines; for the giving notice of accidents; for the giving notice of the opening and abandonment of mines; for the fencing of abandoned mines; and for the sending of plans of abandoned mines to the Secretary of State. It also provides for the appointment of inspectors of mines, and regulates their powers. It provides for the giving of notice, by the inspectors, of causes of danger not expressly provided against; for annual and special reports by inspectors; for formal investigation of accidents when directed by the Secretary of State; and for the publication of reports. It also provides for arbitrations under the Act, and for coroners' inquests on deaths from accidents. General rules are required to be observed as to ventilation; inspection of machinery; fencing of entrances; withdrawal of workmen in case of danger; use, construction, and examination of safety lamps; lamp stations; use of explosives below ground; possible accumulations of water; signalling and man-holes; dimensions of travelling roads; fencing of old shafts and entrances to shafts; securing of shafts, and of roofs and sides; timbering; option of using shafts; attendance of engineman; means of signalling; covers for cages; chains; appliances to prevent ropes from slipping; breaks and indicators; fencing of machinery; safety-valves for boilers; barometers; stretchers; wilful damage; keeping of books; and periodical inspection. Provisions also exist for the establishment of special rules applicable to the special condition of any particular mine, and for the publication of an abstract of the Act, and a copy of the special rules. Offences against the Act are punishable by penalty or fine; or by imprisonment in the case of wilful neglect, endangering life or limb; and there may be summary proceedings for offences. The Coal Mines (Check-Weigher) Act, 1894, imposes a penalty for interfering with the office of a check-weigher. The Coal Mines Regulation Act, 1896, amends the provisions as to special rules in the Act of 1887. It also provides for the representation of workmen on arbitrations; for the contents of plans of mines in working; for plans of abandoned mines; for the amendment of general rules as to lamps, inspection, and "tamping"; and for explosives. And an order exists containing a list of permitted explosives.

Metalliferous Mines Regulation Acts.—The Metalliferous Mines Regulation Act, 1872, applies to every mine of whatever description other than a mine to which the Coal Mines Regulation Act, 1887, applies. The Act prohibits the employment below ground of boys under twelve, and of girls and women. It regulates the employment of male young persons. It requires a register to be kept of boys and male young persons employed. It regulates the employment of young persons under eighteen in connection with engines. It prohibits the payment of wages at public-houses. It requires notice of accidents to be sent to an inspector. It requires notice of opening and abandonment of mines to be given to an inspector. It provides for the fencing of abandoned mines. It requires plans of abandoned mines to be sent to the Secretary of State. It provides for the appointment of inspectors, and it regulates their powers. It provides for the giving notice of causes of danger not provided for by the rules. It requires plans to be kept, and reports to be made. It provides for arbitrations under the Act, and for coroners' inquests on deaths from accidents. General rules are required to be observed as to ventilation;

gunpowder and blasting; man-holes; spaces in horse roads; keeping spaces clear; fencing of old shafts, and of entrances to shafts; securing of shafts; division of shafts; signalling; covers for cages; chains; appliances to prevent ropes from slipping; breaks; inclination of ladders; dressing rooms; fencing of machinery; gauges to boilers and safety-valves; and wilful damage. Provisions also exist for the establishment of special rules applicable to the special condition of any particular mine, and for the publication of an abstract of the Act, and a copy of the special rules. Offences against the Act are punishable by penalty, or by imprisonment for wilful neglect endangering life or limb; and there may be summary proceedings for offences. The Metalliferous Mines Regulation Act, 1875, provides for yearly returns being made by the owners and agents of mines to the district inspector. The Slate Mines (Gunpowder) Act, 1882, empowers the Secretary of State to exempt slate mines from the provisions of the Act of 1872, with respect to the use of explosives. The Metalliferous Mines (Isle of Man) Act, 1891, provides for the application of the Act of 1872 to the Isle of Man.

Quarries Fencing and Regulation Acts.—The Quarry (Fencing) Act, 1887, provides for the fencing of quarries. The Quarries Act, 1894, applies to every place (not being a mine) in which persons work in getting mineral, and any part of which is more than twenty feet deep. It applies to quarries some of the provisions of the Metalliferous Mines Regulation Acts; and it modifies the application of the Factory Acts to quarries.

Factory and Workshop Acts.—A workshop under these Acts includes quarries and "pit banks."

Truck Acts.—The Truck Acts apply to persons employed in the working of mines and quarries. They compel the payment of wages in coin, and provide for the deductions which may be made from wages.

Employers and Workmen Act.—The Employers and Workmen Act, 1875, applies to miners.

Employers Liability Act.—The Employers Liability Act, 1880, also applies to miners.

Workmen's Compensation Act.—The Workmen's Compensation Act, 1897, applies to employment on, or in, or about a "mine" or "quarry." "Mine" in the Act means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Act, 1872, applies. And "quarry" means a quarry under the Quarries Act, 1894.

[*Authorities.—General*—Bainbridge, 4th ed., 1878; R. F. MacSwinney, 2nd ed., 1897; Hunt's *Boundaries and Fences*, 4th ed., 1896. *Collieries*—C. Chisholm; M. Peace, 1888; Fowler, 4th ed., 1884. *Derbyshire*, see Bibliography to BARMOTE COURT; *Laws of the World*, Walmesley, 1894.]

Minister.—It is an indictable misdemeanour to obstruct or prevent, or to endeavour to obstruct or prevent, by threats or force, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of worship, or at the burial of the dead, or to offer any violence to him while so engaged, or whilst going to or returning from any such duty. A person convicted of such an offence is liable to be imprisoned for any term not exceeding two years, with or without hard labour (24 & 25 Vict. c. 100, s. 36). See BRAWLING; CLERGY. See also BAPTISM; MARRIAGE; NON-CONFORMIST; MINISTÈRE PUBLIC.

Ministère Public—A term met with in cases involving French law to describe the office of the PROCUREUR (*q.v.*). See also PARQUET.

Ministerial Acts.—The acts of justices are either judicial (see JUDICIAL ACTS) or ministerial. Where, in dealing with a matter before them, justices are not entitled to withhold their assent, if they think fit, or to exercise a judicial discretion, they are performing a ministerial act. The test as to whether a particular act is judicial or ministerial is, as suggested by Wightman, J., in the course of the argument in *Staverton Overseers* v. *Ashburton Overseers*, 1855, 4 El. & Bl. 526, whether a mandamus will lie to compel its performance. If the act which the justices are called upon to perform is ministerial, and they refuse to perform it, its performance may be compelled by mandamus. The following are examples of ministerial acts:—Backing warrants, allowance of a poor rate which *ex facie* is good, the granting of a certificate of dismissal of a complaint for an assault under 24 & 25 Vict. c. 100, s. 44, the receiving and hearing of an information or complaint.

A magistrate may, it seems, perform a ministerial act out of his county. See JUSTICE OF THE PEACE.

[*Authorities.*—Paley, *Summary Convictions*, 7th ed., pp. 19 *et seq.*; *Magistrates' Annual Practice*, 1898, 5, 17.]

Ministers Resident are an intermediate class in diplomacy between envoys extraordinary and ministers plenipotentiary and *chargé d'affaires*. The British representatives at the courts of several of the States forming the present German Empire (*e.g.* Bavaria and Saxony) are called Ministers Resident. See DIPLOMATIC AGENTS.

Ministry.—The term Ministry is wider than Cabinet, and includes all the holders of political office who come in and go out with the Prime Minister (see CABINET). In this respect ministers may be contrasted with the members of the Permanent Civil Service, whose tenure is independent of party changes. Every department of State has a minister at its head to direct its working and represent it in Parliament. Most of the ministers are appointed by the Crown on the nomination of the Prime Minister, who selects them from the members of his party in either House of Parliament. If they are members of the House of Commons at the time, they vacate their seats by accepting a place of profit under the Crown, but may be re-elected, if their offices are old offices, *i.e.* created before 1705, or to be deemed so by statute. Some of the lesser ministers, such as the Under-Secretaries of State, and the Parliamentary Secretaries to the various Boards, do not technically hold office under the Crown, and so do not vacate their seats in the House of Commons on appointment. Not more than four Secretaries of State, and not more than four Under-Secretaries of State may sit in the House of Commons at any one time (21 & 22 Vict. c. 106, s. 4, and 27 & 28 Vict. c. 34). The Chief-Secretary to the Lord-Lieutenant of Ireland is treated as holding office under the Crown. It sometimes happens that Irish and Scotch law officers do not possess seats in the House of Commons. The Prime Minister decides on the number of ministers to be admitted to the Cabinet (*q.v.*). The chief officers of the royal household, the Lord Steward, Lord Chamberlain, Master of the Horse, Lords in Waiting, etc., are reckoned

as part of the Ministry; and some of them are occasionally chosen to represent a Government department in the House of Lords. The conditions under which ministers hold and exercise their offices have been already dealt with under CABINET and EXECUTIVE GOVERNMENT.

Minor.—See INFANTS.

Mint (*Moneta*)—A place in which coin is manufactured. The Crown, as an incident of its exclusive prerogative to coin and legitimate money, established, even in Saxon times, a principal mint in the Tower of London, and provincial mints and exchanges in many parts of the realm. It also granted to certain ecclesiastical persons the right to issue money—a right which continued till the impeachment of Cardinal Wolsey. Moneyers and other persons were from time to time appointed in exercise of this prerogative, and their proceedings were under the control of the Exchequer, and any tampering by them with the standard of sterling (easterling) coin was punished as treason. The minting was done under contract by indenture from 1279 until 1851; but was the subject of frequent legislative control from the time of Henry VI. In 1325 the officers of the mint were incorporated by charter, and the mint was managed by a master, who was the contractor with the Crown under the indenture; a warden, who collected the seigniorage and superintended the manufacture with a view to exacting the proper amount of seigniorage; a comptroller, who reported on the amount of coin annually struck, as a check on warden and moneyers; an assay master, who had to see to the accuracy of the standard and conformity with it (see ASSAY); the king's clerks, who kept the accounts of the mint; and a cuneator, superseded by a clerk of the irons, who had the control of the dies which, as a general rule, were prepared at the Tower mint and issued to the provincial mints, or private mints, where these had not the right to use their own dies. The whole history of mints and coins up to 1840 is fully dealt with in Ruding's *Annals of the Coinage of Great Britain*, 3rd ed., 1840.

The central mint was in 1810 removed from the Tower to Tower Hill, where it still is. In 1851 the old system of management was dropped, and the mint brought into line as a public department. It is now regulated by the Coinage Act, 1870 (33 & 34 Vict. c. 10). By that Act the Chancellor of the Exchequer is made Master of the Mint, and the Treasury is empowered (1) to fix the number and duties of officers and persons to be employed; (2) to regulate and direct, subject to the Act of 1870, and proclamations under it, the general management of the mint; (3) to appoint (and remove) a deputy-master and other officers and persons to carry on the business of the mint, and to assign them their duties and award them their salaries (ss. 13–15). At the Royal Mint are made all the coins required for the British Empire, except what is coined at the Calcutta and Bombay Mints and in Australia, where three branch mints have been established by Order in Council, at Sydney in 1853 (St. R. & O., Rev. 631), at Melbourne in 1869 (St. R. & O., Rev. 627), and at Perth in 1896 (St. R. & O. 1896, p. 848). These mints are regulated under Colonial Acts, assented to by Orders in Council, made under sec. 11 (8) (9) of the Act of 1870; and see COIN, BRITISH; COIN, COLONIAL.

The prerogative to regulate the dimensions, designs, weight, and currency of the coins is exercised now by proclamation under the Act of 1870. But the standard of coins made at the mints is regulated by the Act of 1870

(ss. 4, 16, 17, Sched. I.), and the ASSAY by sec. 12 in England, and an Order in Council of 29th June 1871 (St. R. & O., Rev. vol. i. p. 623). There are also many prerogative orders and proclamations. Subsequent orders are printed in the annual volumes of Statutory Rules and Orders. All these up to 1890 are collected in the Statutory Rules and Orders, Revised, under the title COIN, and as to the colonies in vol. viii. pp. 615–666.

The mint is bound to assay and coin any gold bullion brought there, without charge for assay or waste in coining, if the fineness is such that it can be brought to the standard without refining. If the bullion is finer than the standard, the bringer is entitled to receive in coin an additional amount proportionate to the superior fineness (33 & 34 Vict. c. 10, s. 8). The price at which bullion is taken from its owners is £3, 17s. 10½d. per oz. But it is usually taken through the Bank of England, which pays £3, 17s. 9d., and gets the difference as a commission. The Treasury supplies the Master of the Mint as required with the sums necessary to purchase bullion. All receipts and profits of the mint (except in the case of branch mints) are paid into the receipt of the Exchequer, and carried to the Consolidated Fund (33 & 34 Vict. c. 10, ss. 9, 10).

The mechanical and technical aspects of minting are fully treated in the *Encyclopædia Britannica* and *Chambers's Encyclopædia*, under the title "Mint."

Minutes—Memoranda or notes recording what has taken place at meetings. By the Companies Act, 1862, s. 67, companies are required to cause minutes of all resolutions and proceedings of general meetings, etc., to be duly entered in books provided for the purpose; and any such minute, if purporting to be signed by the chairman of the meeting at which the resolutions recorded were passed, or by the chairman of the next succeeding meeting, is declared admissible in evidence in all legal proceedings. As to minutes in Chancery proceedings, see DECREES; JUDGMENT; ORDER.

Misadventure, Homicide by.—See HOMICIDE; INFORTUNIAM, HOMICIDE PER.

Misappropriation by Servants Act.—This statute (26 & 27 Vict. c. 103), after reciting that the offence of taking corn or other food by a servant from the possession of his master, contrary to his orders, for the purpose of giving the same to the horses or other animals of such master, was a felony, provides that a servant guilty of such an offence shall not be guilty of felony, but nevertheless shall be liable on conviction before justices to a fine not exceeding £5, or to be imprisoned with or without hard labour for any term not exceeding three months. See MASTER AND SERVANT, *ante*, p. 259.

Mischievous—

Animal.—See ANIMALS.

Behaviour; Conduct.—See MALICIOUS DAMAGE.

Misdemeanour.—Every offence of a public nature, whether of omission or commission, which does not amount to treason or

felony falls under the head "misdemeanour." This term does not belong to the earliest stage of the criminal law, which dealt with trespasses (*transgressiones*), of which felonies were a sub-class. The next stage was to treat felonies and trespasses as distinct, though every common law felony involved a trespass. The distinction between civil or actionable trespass and trespass against the peace, or criminal trespass, was not for some time clearly drawn (Pollock and Maitland, *Hist. Eng. Law*, ii. 462, 510), and probably was ultimately elaborated by a kind of local option which led grand juries to present before the justices of assize the graver forms of minor interference with public peace and order. On the constitution of justices of the peace, they were empowered to try felonies and trespasses against the peace, which shows that at that date (1344, 18 Edw. III. st. 1, c. 2) the distinction between indictable and actionable trespass was established; and the distinction is further illustrated by chapter 5 of the same statute, which forbids the issue of exigents on indictments for trespass unless "against the peace," apparently indicating that some indictments did not contain these words.

It does not appear at what date the term "misdemeanour" was first used; but probably it was adopted as more appropriate than "trespass" to a number of violations of law, such as forgery, perjury, and public nuisance, which did not include the technical elements of trespass. In the earlier books, MISPRISION is used to describe what would now be called the more serious forms of misdemeanour. The editors of Staundforde, Coke, Hale, and Hawkins do not consider misdemeanour worthy of a place in the Index of Contents. Its derivation and original meaning are obscure, and it seems to have been a bastard equivalent for "misbehaviour."

The term is a *nomen collectivum* (*R.* v. *Powell*, 1831, 2 Barn. & Adol. 75), and comprises an enormous variety of offences of very different degrees of gravity, from perjury, with intent to get a man convicted and executed (*R.* v. *Macdaniell*, 1755, 19 St. Tri. 746), down to the pettiest contravention of a by-law about dust-bins. The main classes, however, are—

(1) Offences which were indictable misdemeanours at common law, *e.g.* assaults and contempts of Court.

(2) Offences explicitly declared to be indictable misdemeanours by statute.

(3) Breaches of a public statute, which are regarded as a criminal offence, or of orders or regulations validly made under a statute, where the statute makes no explicit provision as to the mode of punishment (*R.* v. *Walker*, 1875, L. R. 10 Q. B. 355; *R.* v. *Hall*, [1891] 1 Q. B. 767).

(4) Breaches of statute which are directed to be tried by Courts of summary jurisdiction, sometimes called petty misdemeanours.

The subsisting distinctions between felony and misdemeanour are—

(1) Apart from statute, arrest cannot be effected without warrant of a justice, except where an actual breach of the peace is going on (see ARREST).

(2) Prosecution may be either by indictment or by criminal information or *ex officio* information (see INDICTMENT; INFORMATION).

(3) Bail is as of right, so far as the High Court is concerned, though discretionary on the part of justices in those cases in which the costs of prosecution fall on the local rate (see BAIL).

(4) There is no right of peremptory challenge of the jurors (see JURY).

(5) The accused must attend on arraignment, but need not be present throughout the trial (Steph. *Dig. Cr. Law*, art. 302); and in the High Court the accused may plead by attorney (60 Geo. III. and 1 Geo. IV. c. 4; Crown Office Rules, 1886).

(6) There are no accessories after the fact to misdemeanour, nor any

misprision thereof; but conspiracies to defeat justice in respect to a misdemeanour appear to be indictable (see ABETTOR; ACCESSORY; HUSH MONEY).

(7) Any number of counts for different misdemeanours may be included in one indictment, and successive sentences passed thereon, subject to the power of the Court to intervene if the number of offences charged causes inconvenience or injustice in trial (see CUMULATIVE SENTENCE; INDICTMENT).

(8) Unless a statute otherwise provides, the misdemeanant can be imprisoned as long as the Court thinks fit (see Steph. *Dig. Cr. Law*, 5th ed., art. 23; ARBITRARY PUNISHMENT). A distinction is drawn for purposes of imprisonment between first-class misdemeanants and other criminal prisoners (see PRISON).

(9) No forfeitures of land or goods were ever worked by conviction, as in the case of treason, felony, and misprision of treason. But reasonable fines may be imposed (see FINE).

The Criminal Code Commissioners proposed to sweep away all these distinctions so far as they form part of the present law.

[*Authorities.*—Burn, *Justice*, 30th ed., vol. iii. p. 1009; Steph. *Hist. Cr. Law*, ii. 197; iii. 351; *Dig. Cr. Law*, 5th ed., p. 18; Archb. *Cr. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed., vol. i. p. 193.]

Misdirection.—See NEW TRIAL.

Mise.—The issue in the old writ of right was so called. The name was also applied to a tax or tollage.

Misericordia.—An arbitrary amerciament or punishment imposed on any person for an offence was so called, because, it was said, it ought to be small and less than the offence.

Misfeasance.—See NEGLIGENCE.

Misjoinder.—See JOINDER OF CAUSES OF ACTION; PARTIES.

Misnomer.—See PARTIES; PLEADING.

Misprision.—This term is not found in modern French, but in the forms *mesprcsure* and *mespreson* occurs in old French in the sense of misdeed (Sainte Palaye, *Dict. Hist. de l'ancienne Langue Francaise*, *s.vv.*). It appears to be connected with *mepriser* (*minus pretiari*), to neglect or contemn.

"Words without an overt deed are to be punished in another degree as a high misprision" (3 *Co. Inst.* 14), and Hale (1 P. C. 372) speaks of uttering false money as "a great misprision, but not misprision of treason, unless the utterer knows him that counterfeited it and concealed it." Hawkins (P. C., bk. i. c. 20) says that "misprision is generally applied to all such high offences as are under the degree of capital and nearly bordering

thereon," such as rescuing a prisoner before the king's justices in Westminster Hall (3 *Co. Inst.* 140), or drawing a weapon on a judge; and it is said by these authors, on the authority of Staundforde, *Pl. Cr.* bk. i. c. 39, that a misprision is contained in every treason or felony, and that the Crown may elect to proceed for the lesser offence (3 *Co. Inst.* 140, 142).

Coke (3 *Inst.* 139) and Hawkins (P. C., bk. i. c. 20, s. 2) indicate several divisions of misprision—(1) Negative, passive, or of omission, as in concealment or non-discovery of treason or felony; (2) positive, active, or of commission, as a committing some heinous offence under the degree of treason or felony. And Coke goes on to speak of various offences, *e.g.* judicial corruption, as great misprisions (3 *Inst.* 145). The second class, if it can ever be regarded as having had a distinct legal recognition, has now been relegated to the category of misdemeanours. The misprisions by omission still recognised as part of the law are misprision of treason and misprision of felony.

1. *Misprision of Treason.*—Bracton (*de Coronâ*, ff. 118, 141) speaks of an absolute duty of a man who knows of the commission of high treason to reveal it to the king or his ministers, and seems to treat the failure as equivalent to treason, calling the offender *manifestus seductor domini regis, i.e.* an overt traitor against our lord the king (see 2 Pollock and Maitland, *Hist. Eng. Law*, 505). The developments of the early law need not, however, be considered in view of sixteenth century enactments still in force. No act is treason or misprision of treason which is not so under the Statute of Treasons, 1351, or some Act passed after 1553 (see 1 Mary, st. 1, c. 1, s. 1; 1 Hale, P. C. 373); and since 1554 mere concealment or keeping secret of high treason is only misprision of treason, and does not amount to high treason (1 & 2 Phil. & Mary, c. 10, s. 8). These show that a distinction between treason and misprision of treason then existed. The later Act gets wholly rid of the view of Bracton, and reduces misprision of treason to the offence of concealing, or keeping secret, or failing with due diligence to inform of treasons committed or threatened by others, without the assent of the offender, or any active part in rescuing the traitors from justice (4th Report Criminal Law Commissioners, 1848, p. 79). There are no accessories before or after the fact to treason, and those who do with respect to it what would make them accessories in felony are treated as principal offenders (see ACCESSORY).

The offence has a further difference from that of an accessory after the fact, that the traitor or felon need not be convicted before the misprision is tried.

The offence is not treason or felony, and might be described as a misdemeanour but that it is triable by the same procedure as TREASON (*q.v.*). It is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

Misprision or concealment of treason, whether committed abroad or in England, appears to be triable in the High Court (35 Hen. VIII. c. 2; see 5 & 6 Edw. VI. c. 11, s. 4).

The punishment at common law is by imprisonment for life, and forfeiture to the Crown of all goods, and the profits of the offender's lands. It involved no attainder or corruption of blood, and the forfeitures have been left untouched by the Act of 1870 (33 & 34 Vict. c. 23). (See 3 *Co. Inst.* 36; 1 Hale, P. C. 374.)

Prosecutions for the offence are even rarer than for treason, and while the offence still exists there is so little definite authority on it, that Sir James Stephen's definition in his *Digest of the Criminal Law* must be taken

as representing a mere expression of Hale's opinion, and the proposition that it is a public duty to inform some judicial officer of any treason.

The uncertainty as to law and policy as to the offence is illustrated by the forms in which it has been attempted to deal with it in the Criminal Code.

The Draft Code of 1878, cl. 35, substitutes for it the following definition:—

"Every one shall be guilty of an indictable offence, and shall on conviction thereof be liable to penal servitude for life, who (*a*) becomes an accessory after the fact to high treason; or (*b*) who, knowing that any person has committed high treason, does not with reasonable despatch give information thereof to a justice of the peace, *or to some other person in order to the apprehension of the offender.*"

This is repeated in the Code of 1879 (cl. 78) and the Code No. 1 of 1880 (cl. 79), with the substitution for the words in italics of the following words, "or use other reasonable endeavours to prevent the commission of the offence."

The Draft Code No. 2 of 1880 (cl. 486) omits the sub-clause (*b*) of the Bills of 1878 and 1879, without substituted words, but makes the offence punishable wherever committed by a natural-born or naturalised subject (35 Hen. VIII. c. 2).

2. *Misprision of felony* is committed by persons who conceal or procure the concealment of petit treason or any felony barely known by them to have been committed, whether against the common law or any statute to which the concealers were not consenting at the time of commission. It is distinct from being accessory before the fact by absence of consent or assistance; and from being accessory after the fact, because it can be committed without harbouring the felon or taking any active steps to protect him from justice (3 *Co. Inst.* 140; 1 Hale, P. C. 373).

It is an indictable misdemeanour, triable at Quarter Sessions, and punishable at common law by fine and imprisonment. For a precedent of indictment, see 2 Chit. *Cr. Law*, 232. Misprisions by officers of justice are now dealt with by indictment at common law for neglect of public duty, or by prosecution under the Acts relating to the sheriff and the police. And the offence has not in recent years been the subject of prosecution, but the duty to inform officers of the law as to felonies, and to assist in taking felons, remains (see 1 Chit. *Cr. Law*, 3, 4; 54 & 55 Vict. c. 55, s. 8; *R.* v. *Sherlock*, 1866, L. R. 1 C. C. R. 20).

It is distinct from THEFT BOTE, as the latter involves not only knowledge of a theft by the owner, but taking the goods back or receiving amends not to prosecute the thief (3 *Co. Inst.* 134). See *R.* v. *Burgess*, 1885, 16 Q. B. D. 141; FELON, FELONY; HUE AND CRY; HUSH MONEY.

Misrecital.—A misrecital will not vitiate a deed if it is sufficiently clear what is intended (see *Evans* v. *Jones*, 1853, Kay, 29); but a misrecital may influence the construction of a deed (Elphinstone, *Interpretation of Deeds*, pp. 139, 140). In *In re Carter's Trusts*, 1869, 3 Ir. R. Eq. 495, it was held that an erroneous recital in a deed which purported to recite certain testamentary intentions in a draft will could not be corrected by reference to the draft will itself. See RECITALS.

Misrepresentation.—See COMPANY, *Prospectus*; CONTRACT; DECEIT; ESTOPPEL; FRAUD; VENDOR AND PURCHASER.

Missing Ship.—See MARINE INSURANCE.

Missing Word Competitions.—It was for a time the practice for enterprising owners of newspapers to advertise that they would give prizes to the persons who most successfully filled in the missing words in a paragraph printed in the paper with blanks. In *Barclay* v. *Pearson*, [1893] 2 Ch. 154, it was held that this competition was illegal, as constituting a lottery within 42 Geo. III. c. 119, but that the subscribers could, before distribution of prizes, reclaim their contributions. See LOTTERIES.

Missionary Purposes.—A trust for "missionary purposes" is void as too vague and uncertain (*Scott* v. *Brownrigg*, 1881, 9 L. R. Ir. 246).

Misstatement.—See COMPANY; DECEIT; ESTOPPEL; FRAUD, etc

Mistake.

TABLE OF CONTENTS.

I. Mistake in General has no Legal Effect . . . 433
II. But may show the Absence of some Specific Intention . 434
III. Relief in Equity, Specific Performance 434
IV. Exceptions to the Rule, Fraud and Misrepresentation . 434
V. When Mistake cannot be alleged, Negligence, Mistake of Law 435
Mistake in regard to Contract: Division of the Subject . . 435
(*a*) *No Contract Apparent or Real* 436
VI. Offer altered by a Stranger 436
VII. Real Ambiguity . . 436
(*b*) *Mistakes of Expression* . 436
VIII. In the Offer, not known to the Acceptor . . 436
IX. In the Offer, known to the Acceptor. . . . 437
X. In drawing up the real Agreement . . . 437
(*c*) *Essential Error* . . 437
XI. As to the Nature of the Transaction . . . 437
XII. As to the Person of the other Party . . . 438
XIII. As to a Common Fundamental Assumption . 438
XIV. Mistaken Construction of their Contract by the Parties . 439
XV. Money paid by Mistake of Fact 439

I. In general the civil rights and liabilities which are the legal consequences of an act are wholly independent both of the intention and motives which accompanied and occasioned it, and they are consequently unaltered by any mistake which may have affected such intention or motives. "The general rule of private law is that mistake *as such* has no legal effects at all" (Pollock on *Contract*, 6th ed., p. 424, referred to below as "Pollock"). For example, an assault or a libel is not excused because the defendant has attacked the wrong man; nor a trespass to land or conversion of goods (see vol. iii. p. 360) because he was mistaken as to the title to the property (as to trespass to goods and to the person, see vol. ii. p. 405). So if a trustee pays away the trust property to the wrong person, he must pay over again to the rightful claimant (*Hilliard* v. *Fulford*, 1876, 4 Ch. D. 389), unless he occupied a quasi-judicial position (*Ex parte Ogle*, 1873, L. R. 8 Ch. A. 711—a trustee for creditors; cp. the case of a liquidator, *Knowles* v. *Scott*, [1891] 1 Ch. 717, and *In re Hill's Waterfall Co.*, [1896] 1 Ch. 947; *quære*, whether this exception could not be explained as the mistake of an agent for which the principal must suffer). A number of other instances are collected in Pollock, pp. 425 *et seq.*

II. Where, however, certain legal consequences are only attached to the act if it is accompanied by a particular intention, proof of a mistake may show that such intention did not exist in the case in question. Thus dishonesty is an element in FRAUD (see vol. v. p. 494), and it cannot exist if, by reason of a mistake, the defendant believed his representation to be true; similarly, in order to establish the waiver of a right, it must be shown that the person entitled was aware of its existence (see ACQUIESCENCE, vol. i. p. 90, and *Willmott* v. *Barber*, 1880, 15 Ch. D. 96, there cited). The case of a mistaken signature, from which a consent or an intention to effect a grant would be inferred, unless it were shown to have been made under a misconception (see below, XI.), is less obvious, but really falls under the same head.

According to the analysis of some jurists an appropriate intention on the part of the actor is always necessary to constitute a "judicial act," that is to say an act which has legal consequences as his act. This is what is meant by the correspondence of the will and expression (Savigny, cited by Holland, *Jurisprudence*, 8th ed., p. 104, referred to below as "Holland"). But no such general principle is recognised by English law in any other sense than that the "act" must not be involuntary (see *The Sisters*, 1876, 1 P. D. 117; ACCIDENT, vol. i. p. 60; CAVEAT ACTOR, vol. ii. p. 405; and JURISPRUDENCE, vol. vii. p. 136). In regard to contract, the title under which the question has been most discussed, the view now commonly held is that the law applies only external standards, holding a party to have agreed when, and in such manner as, a reasonable man knowing the circumstances of the case would have believed he intended to agree (Holland, p. 230; Pollock, p. 2; and *ante*, vol. iii. p. 343; Holmes on the *Common Law*, p. 308; see Anson on *Contract*, Introduction, *ad fin.*).

III. In equity there was no general jurisdiction to relieve against the legal consequences of mistakes (*Barrow* v. *Isaacs*, [1891] 1 Q. B. 417), but the correction of mistakes in instruments so drawn as not to express the real intentions of the parties (below, X.) by rectification or cancellation was undertaken by the Court of Chancery from very early times (*Astel* v. *Cawston*, Edw. IV. 1 Cal. 108; Tothill, ed. 1820, p. 131). And in the case of a failure to pay money, whereby a forfeiture was incurred, substantive relief was given by the Court (*Barrow* v. *Isaacs*, *supra*; see PENALTY).

The most important difference between the effect of mistake at law and in equity was in regard to SPECIFIC PERFORMANCE (*q.v.*). The Court of Chancery in cases where a hardship amounting to injustice would be inflicted by holding the mistaken party to his bargain (*Tamplin* v. *James*, 1879, 15 Ch. D. 215; *Goddard* v. *Jeffreys*, 1881, 51 L. J. Ch. 57), or where the plaintiff had contributed to the defendant's mistake (*l.cc.*), refused that special equitable remedy, leaving the plaintiff to his action for damages at law. The same rule still prevails, but the Court before which an action for specific performance comes must now dispose of the whole matter by giving damages where they are recoverable (*Tamplin* v. *James*, *supra*).

IV. The rule that money paid under a mistake of fact may be recovered by the payor (below, XV.) is exceptional. In some cases gifts by will, the motive for which is based upon a mistake, are inoperative (see WILL). Other exceptions, or apparent exceptions, in regard to contract are dealt with below.

As to delivery induced by mistake, see DELIVERY OF POSSESSION, vol. iv. p. 202, and *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459. The rule that a party is none the less bound because he acted under a mistake does not apply in favour of another whose conduct induced the mistake by a

material misrepresentation (CONTRACT, vol. iii. p. 343), still less if such other party's conduct was fraudulent (*ibid.* and see FRAUD, vol. v. p. 494). In such cases the person in fault may also be estopped from denying that the facts were as he induced the other party to believe them to be (see ESTOPPEL, vol. v. p. 74).

V. *When Mistake cannot be alleged. Negligence.*—"A person is not allowed to allege mistake in a matter of fact which it was his duty to know, or which, having the means of knowledge, it was wilful or negligent for him not to know; for in such cases knowledge is imputed to him" (Leake on *Contracts*, 3rd ed., p. 263, referred to below as "Leake"; *Tamplin* v. *James*, 1879, 15 Ch. D. 215). So if a man executes a deed without troubling to read it, but understanding that he is dealing in some way with the property concerned (*Foster* v. *Mackinnon*, *Lewis* v. *Clay*, cited below, XI.), he takes his risk (Sheppard's *Touchstone*, 56; *Hunter* v. *Walters*, 1871, L. R. 7 Ch. 75). The result is the same if he accept an unambiguous offer without looking at it (*Mackenzie* v. *Hesketh*, 1877, 7 Ch. D. 675), or bid at an auction without considering the plans (*Tamplin* v. *James*, *supra*), or compromise an action forgetting some matter already in evidence (*In re West Devon Consols*, 1888, 38 Ch. D. 51), or take a lease without investigating as to the length of the lessor's title (*Besley* v. *Besley*, 1878, 9 Ch. D. 103; *Clayton* v. *Leech*, 1889, 41 Ch. D. 103).

But this rule has no application to claims for money paid under mistake of fact (below, XV.; *Kelly* v. *Solari*, 1841, 9 Mee. & W. 54; *Townsend* v. *Crowdy*, 1860, 8 C. B. N. S. 477), or to cases where a special intention has to be proved (above, II.), as cases of fraud (see per Lord Blackburn in *Brownlie* v. *Campbell*, 1880, 5 App. Cas. at p. 952; and FRAUD). Of course the facts may have a bearing on the truth of the party's statement that he was mistaken (*l.cc.*).

Mistake of Law.—No one can be heard to allege a mistake of a general rule of law as the ground for setting aside or rectifying an instrument, or avoiding a contract (*Powell* v. *Smith*, 1872, L. R. 14 Eq. 85; *In re Railway Time-Table Co.*, 1889, 42 Ch. D. 98). But the rule *ignorantia juris haud excusat* does not apply to a mistake as to a right depending on questions of mixed law and fact (see Pollock, p. 423, where the whole doctrine is fully discussed), or to mistakes as to private rights, *e.g.* a party's title (*Cooper* v. *Phibbs*, cited under XIII.; *Earl Beauchamp* v. *Winn*, 1873, L. R. 6 H. L. 223). It is no answer even to a suit for a specific performance (see III.) for a defendant to say that, although he understood what the words of an agreement were, he was mistaken as to their legal effect (*Hart* v. *Hart*, 1881, 18 Ch. D. 670; see *Wilding* v. *Sanderson*, cited under VIII.). As to money paid under mistake, see XV. See COMPROMISE and FAMILY ARRANGEMENT.

CONTRACT.

General Rule—Division of the Subject.—The cases in which a contract is avoided by mistake may be reduced to two classes—those in which the language employed is, under the circumstances, meaningless, because it refers to an object not in existence (XIII.), or from ambiguity (VII.); and those in which the true meaning of the offer or acceptance of the mistaken party was, or is taken to have been, known to the other (IX.) (Professor Holland, *Jurisprudence*, p. 234). To these must be added a third class, in which the contract itself is not affected, but it has, by mistake, been wrongly expressed in an instrument purporting to contain it (X.). It will be more convenient here to follow the usual distinction between *mistakes of expression*, precluding real concurrence of intention, and mis-

takes affecting the motive for agreement, or *essential errors*, inducing such concurrence. Mistakes as to the act of expression, included under the latter division, where *non est factum* might be pleaded (XI.), should logically, perhaps, be separately dealt with (as by Mr. Leake).

(*a*) No Contract Apparent or Real.

VI. *Offer altered by a Stranger.*—The distinction last referred to assumes that there is at least an apparent agreement; that is to say, an accord in the terms used by both parties to the contract. Where this accord is prevented by the mistake of a third party, as by a telegraph clerk sending forward a wrong message, he being the agent of neither party (*Henkel* v. *Pape*, 1870, L. R. 6 Ex. 7), or of the broker, who is the agent of both, in writing out bought and sold notes in different terms (*Thornton* v. *Kempster*, 1814, 5 Taun. 786; 15 R. R. 658), there is obviously no contract at all.

VII. *Real Ambiguity.*—And the cases where the parties have used ambiguous terms, which, when the facts are known, are seen to have, as used, different meanings, are in reality similar. Thus where there were two ships of the same name, to one of which the terms used were accurately applied by each party (*Raffles* v. *Wichehhaus*, 1864, 2 H. & C. 906), or two plans (*Hodges* v. *Horsfall*, 1829, 1 Russ. & M. 116; 32 R. R. 157), or two charter-parties (*Smidt* v. *Tiden*, 1874, L. R. 9 Q. B. 446), neither party was bound. These cases are sometimes classed as examples of "essential error" (*e.g.* Pollock, pp. 458, 463), but they do not depend, as the cases with which they are included, upon any implied condition (XIII.).

(*b*) Mistakes of Expression.

VIII. A mistake in the terms used by one party does not prevent the contract being binding according to the proper meaning of such terms, unless it was known, or should have been known, to the other. The "legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' *i.e.* a judge or jury, would put upon such acts" (Holland, p. 233; Leake, p. 265; *Smith* v. *Hughes*, 1871, L. R. 6 Q. B. at p. 607; *Ionides* v. *Pacific Insurance Co.*, 1871, L. R. 6 Q. B. 674; see also the cases cited above, V.).

The rule does not apply to contracts *uberrimæ fidei* (see *ante*, vol. iii. pp. 344, 345), nor where the mistake is material and was induced by the conduct of the other party (*Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Stewart* v. *Kennedy*, 1890, 15 App. Cas. 108). In such a case the contract may be set aside (*l.cc.*). But see *ante*, vol. iii. p. 345.

A mistake in stating the offer which a party intended to make must be distinguished from a mistake with regard to some matter inducing the party to make the offer. The latter case does not fall under the head of mistake in expression at all, but is a mistake affecting motive. As to this the rule is *falsa causa non nocet* (below, (*c*)). "Even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound," apart from fraud, for "there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the vendor" (per Blackburn, J., in *Smith* v. *Hughes*, 1871, L. R. 6 Q. B. at p. 607; *Davies* v. *London and Provincial, etc., Co.*, 1878, 8 Ch. D. 469; see *Hill* v. *Gray*, 1816, 1 Stark. 434; 18 R. R. 802, explained in *Keates* v. *Cadogan*, 1851, 10 C. B. at p. 600, and in *Peek* v. *Gurney*, 1873, L. R. 6 H. L. at p. 390;

and *Cox* v. *Prentice*, 1815, 3 M. & S. 344; 16 R. R. 288; see also CAVEAT EMPTOR, vol. ii. p. 406).

IX. If the mistake was known to the other party, or would have been known to any reasonable man in his place (*Paget* v. *Marshall*, 1884, 28 Ch. D. 255) at the time, he cannot insist upon the contract. "If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in the sense to which the mind of the purchaser did not assent" (per Hannen, J., in *Smith* v. *Hughes*, *supra*). It is an obvious fraud for him to seek to do so (*Tamplin* v. *James*, 1879, 15 Ch. D. 215; Pollock, p. 460; Leake, p. 267). Thus where the lessor or vendor made an obvious slip as to the rent or price asked (*Garrard* v. *Frankel*, 1862, 30 Beav. 445; *Webster* v. *Cecil*, 1861, 30 Beav. 62), or as to the property to be included in the conveyance (*Harris* v. *Pepperell*, 1867, L. R. 5 Eq. 1), the claimant was given the option either to have the agreement performed as the other party intended, or to have it set aside.

X. Where there is a mistake in drawing up a writing or other instrument intended to carry out the contract, the true contract is binding on the parties, and it will be enforced, and the instrument, if necessary, will be rectified, unless some formal difficulty, such as the Statute of Frauds, intervenes, or else will be cancelled. Thus where the indorsee's name was placed on the face of a bill as if he were a drawer (*Druiff* v. *Lord Parker*, 1868, L. R. 5 Eq. 131), a suit to amend the bill in order to enable him to sue upon it was properly brought. The rule assumes that a valid contract has been made. "Courts of equity do not rectify *contracts*; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts." "It is always necessary for a plaintiff to show that there was an actual contract antecedent to the instrument which is sought to be rectified" (per James, V.C., in *Mackenzie* v. *Coulson*, 1869, L. R. 8 Eq. at p. 375). The "slip" preceding a policy of marine insurance is not a contract, so that the policy cannot be rectified to accord with it (*l.c.*). Actions for rectification (*q.v.*) are specially assigned to the Chancery Division (Judicature Act, 1873, s. 34), but every Court must now give effect to any right to have an instrument which comes before it cancelled or rectified (*Mostyn* v. *West Mostyn Co.*, 1876, 1 C. P. D. 145).

In some cases the intended meaning can be given to the instrument as a matter of construction (Leake, p. 274; *Wilson* v. *Wilson*, 1854, 5 H. L. at p. 66; *Ind's* case, 1872, L. R. 7 Ch. 485), *e.g.* a clerical error may read as corrected (*In re Northen's Estate*, 1884, 28 Ch. D. 153; *Hutchins* v. *Scott*, 1837, 2 Mee. & W. 809; *Jamaica Rwy. Co.* v. *A.-G. of Jamaica*, [1893] App. Cas. 127—the case of a private Act of Parliament). See BLANKS IN DEEDS, vol. ii. p. 169; Pollock, p. 242. See also RELEASE.

(*c*) ESSENTIAL ERROR.

If the parties intended to agree to the same thing the contract is not avoided by reason *only* (*i.e.* there being no fraud, above, IV., or material misrepresentation, above, IV. and VIII., or warranty, in point) that one of them was induced to agree by some mistake, unless the contract is *uberrimæ fidei* and the mistake is as to matters which ought to have been disclosed (Leake, p. 282; *ante*, vol. iii. p. 345), except in the cases next stated (XI., XII., and XIII.; see CONTRACT, vol. iii. p. 343).

XI. *Error as to the Nature of the Transaction.*—"A person may always dispute the act charged against him as importing an agreement;" he may show that what, on the face of it, purports to be an act of agreement (*e.g.*

his signature to a document) is in the circumstances of the case nothing of the sort (Leake, p. 263; Pollock, p. 443). Thus if a deed is misread to a man who cannot read it himself, and he executes it, believing it to be of a substantially different nature to what it is, "it is not his deed" (*Thoroughgood's* case, 2 Co. Rep. 9 *a*). So if the defendant has signed a paper which is in fact a bill of exchange, believing without negligence that he is only signing a guarantee (*Foster* v. *MacKinnon*, 1869, 4 L. R. C. P. 704), or that he is only witnessing another's signature (*Lewis* v. *Clay*, 1898, 14 T. L. R. 149), he is not bound. Whether negligence in such cases makes any difference is doubtful. On principle it should not, for the signature of the defendant produced against him is strictly analogous to a forged signature (see Pollock, p. 445 *n.*; *Hunter* v. *Walters*, 1871, L. R. 7 Ch. 75). Cases where the actor knows what he is doing but makes a mistake in doing it, as by bidding for the wrong lot at an auction (*Malins* v. *Freeman*, 1836, 2 Keen, 25), or by executing a conveyance relating to the wrong plot, being under no mistake as to its contents (*Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1), and cases where "he takes his risk" (above, V.), must be distinguished from those falling under the present head.

A mistake as to the legal meaning or consequences of a contract (*Stewart* v. *Kennedy*, 1890, 15 App. Cas. 108), or its contruction (*Wilding* v. *Sanderson*, [1897] 2 Ch. 534), or its intended use (*Hunter* v. *Walters*, 1871, 7 Ch. 75), does not avoid it.

XII. A mistake as to the person with whom a party is contracting avoids the contract, if the identity of the person in question is a material consideration inducing such party to contract (Pothier, cited by Fry, J., in *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223). So that if A. makes a contract with B., who is personating C., and it is with C. alone A. intends to contract, the transaction is void (*Boulton* v. *Jones*, 1857, 2 H. & N. 564; see Pollock, p. 450 *n.*), and a delivery of goods in pursuance of the apparent contract passes no property in them (*Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459; *ante*, vol. iii. p. 203).

XIII. Where the parties have contracted upon a common assumption of the existence of some specific thing to which the contract relates, as, for instance, the continued existence of a cargo (*Couturier* v. *Hastie*, 1856, 9 Ex. Rep. 102; 5 H. L. 673), or of a ship (*Barker* v. *Janson*, 1867, L. R. 3 C. P. 303) at sea, or as to the nature of the thing, the contract is void if the thing is not in fact in existence, or if it turns out to be different to what the parties assumed, because it is inferred that the correctness of the assumption, to the extent stated, is a tacit condition of the bargain (Leake, p. 283). If the thing is in existence, but is not of the assumed nature, the difference must be complete. The leading authority is *Kennedy* v. *The Panama, etc., Co.* (1867, L. R. 2 Q. B. 580), where this condition was held not to be complied with, and the plaintiff was bound by an agreement to take shares in the company, although it had been wrongly described as having a contract to carry the New Zealand mails. And it has been held that a wrecked ship is still a ship (*Barr* v. *Gibson*, 1838, 3 Mee. & W. 390). Instances of contracts avoided under the rule are contracts for life assurance (*Pritchard* v. *Merchants' Life Assurance Society*, 1857, 3 C. B. N. S. 622), and for a life annuity (*Strickland* v. *Turner*, 1852, 7 Ex. Rep. 208), where the life had dropped. Where the heir, in the mistaken belief that he was entitled to shares in a company, gave an indemnity to the directors, it was set aside (*Broughton* v. *Hutt*, 1858, 3 De G. & J. Ch. 501). Sales of land are ordinarily made upon the footing that the vendor has a good title; so where land was sold for building, the sale was avoided because,

being affected by restrictive covenants, building upon it was impossible (*Ellis* v. *Rogers*, 1881, 29 Ch. D. 661). As to sales of goods, see CAVEAT EMPTOR, vol. ii. p. 406. It must in every case be a question whether the parties did contract upon such a common assumption, so that a condition can be inferred, or whether either of them took the risk of mistake. Thus in *Hills* v. *Sughruc* (1846, 15 Mee. & W. 253) the contract was to load a cargo of guano from an island, and in *Clifford* v. *Watts* (1870, L. R. 5 C. P. 577) it was to dig 1000 tons of clay from certain land, and the latter contract, but not the former, was held to be subject to an implied condition that there was sufficient material.

The avoidance of agreements to buy one's own property (*Bingham* v. *Bingham*, 1748, 1 Ves. 126; *Cooper* v. *Phibbs*, 1867, L. R. 2 H. L. 149; see also *Jones* v. *Clifford*, 1876, 3 Ch. D. 779; and the judgment of Lindley, L.J., in *Huddersfield Bank* v. *Lister*, [1895] 2 Ch. 273) is usually based upon this rule.

XIV. If the parties act upon a mistaken construction of their agreement they do not thereby alter its legal effect (Pollock, p. 432; *Midland G. W. Ruy.* v. *Johnson*, 1858, 6 H. L. C. 798). Where, accordingly, an account was settled between mortgagor and mortgagee upon the footing of half-yearly rents, for which the mortgage made no provision, it was reopened, the account not being equivalent to payment so as to bring the case under XV. (*Daniell* v. *Sinclair*, 1881, 6 App. Cas. 181). But if the terms are obscure or ambiguous, the subsequent conduct of the parties may show what meaning should be attached to them (*Forbes* v. *Watt*, 1872, L. R. 2 Sc. & D. 214; *Marshall* v. *Berridge*, 1881, 19 Ch. D. 233). And the subsequent action of the parties may amount to a new agreement to vary the old (*Midland G. W. Ruy.* v. *Johnson*, *supra*; see also *Rogers* v. *Ingham*, 1876, 3 Ch. D. 351, where a legatee who had acquiesced in a distribution according to one construction of the will was held to be bound by it; and ACQUIESCENCE and ESTOPPEL).

XV. Money paid voluntarily under a mistake of fact is treated as paid "to the use" of the payor, and may be recovered. But not if the payment was made under compulsion of law, for instance, in obedience to judgment in an action, or, before judgment, in order to stay further proceedings (*Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399). The question under this head is not whether the payor had the means of knowledge, but whether he was really induced to pay the money by mistake, being in truth under no liability to pay it (*Kelly* v. *Solari*, cited under V.). The mistake must be of fact, not of law (*Brisbane* v. *Dacres*, 1813, 5 Taun. 143; 14 R. R. 718), and the distinction between mistakes as to general rules of law and as to matters of private right (above, V.) is inapplicable here (*Skyring* v. *Greenwood*, 1825, 4 Barn. & Cress. 281; 28 R. R. 264; *Aiken* v. *Short*, 1856, 1 H. & N. 210). But a trustee in bankruptcy, or other official under the control of the Court, who has received as such, money not due to him, will be ordered to repay it, although it is not legally recoverable (*Ex parte Simmonds*, 1885, 16 Q. B. D. 308; *Ex parte James*, 1874, 9 Ch. 609). Money not claimed by reason of a mistake of law is not the same as money paid (*R.* v. *Blenkinsop*, [1892] 1 Q. B. 43; *Daniell* v. *Sinclair*, cited under XIV.).

There is no right to repayment where the money is paid in pursuance of a compromise (see COMPROMISE; FAMILY ARRANGEMENT; and *Rogers* v. *Ingham*, cited under XIV.). See the note on "money paid" in Bullen and Leake's *Precedents of Pleadings*.

[*Authorities.*—The text-books cited above, and Kerr on *Fraud and Mistake*.]

Mistress of the Robes.—The Mistress of the Robes to the Queen regnant or consort occupies a corresponding position in the Royal Household to that of the Groom of the Stole when a king is on the throne (see GROOM OF THE STOLE). Thus on several occasions, as in the case of the Duchess of Marlborough in the reign of Queen Anne, she held the combined offices. Since 1839 she has been the only lady of the court who comes into office and ceases to hold her appointment on a change of Ministry. The Mistress of the Robes is not periodically resident at court, but only an attendant on great occasions, and her duties are merely formal. She attends the Queen at all State entertainments and ceremonies.

[*Authorities.*—Gladstone, "Court of Queen Victoria," *Contemporary Review*, June 1875, reprinted in *Gleanings from Past Years*, vol. i. p. 40; *Book of Dignities*, p. 304; article "Royal Household," *Encyc. Brit.*]

Mistrial.—See NEW TRIAL.

Mitigation of Damages.—In actions of contract the damages are generally liquidated; the amount of the verdict does not depend on the motives or conduct of either party, but is settled mainly by arithmetic. Still, in an action for the price of a specific chattel, the purchaser is allowed to give evidence of the breach of any warranty in reduction of the price (*Street* v. *Blay*, 1831, 2 Barn. & Adol. 456; *Poulton* v. *Lattimore*, 1829, 9 Barn. & Cress. 259; 32 R. R. 673). So in the case of goods agreed to be supplied according to a contract, or of unascertained goods sold by description (*Mondel* v. *Steel*, 1841, 8 Mee. & W. 858). So in an action for work and labour done, the defendant may (if he wishes; he is not compelled to) give evidence, in abatement of the claim, that certain portions of the work ordered were badly done, or not done at all (*Davis* v. *Hedges*, 1871, L. R. 6 Q. B. 687). But in all these cases the defendant will only be allowed to show the extent to which the value of the goods or work is diminished by reason of its not being in accordance with the contract; he cannot prove, in reduction of price, consequential damages which arise from the breach of contract, but do not affect the value of the plaintiff's goods or work. For such damages he must specifically counterclaim or bring a cross-action (*Mondel* v. *Steel*, *supra*; *Rigge* v. *Burbidge*, 1846, 15 Mee. & W. 598).

In actions, however, in which the damages are *unliquidated* (whether actions of contract or of tort), many other considerations are allowed to affect the minds of the jury; and many matters may be urged on them in mitigation of damages, which may be roughly grouped under four heads:—

1. *That the plaintiff has not in fact suffered the damage which he alleges.*—The *onus* lies on the plaintiff to prove any special damage which he has sustained. The defendant generally relies on cross-examination to controvert or minimise such a claim; or he may argue, as a matter of law, that the damage claimed is too remote (see DAMAGES, REMOTENESS OF, vol. iv. p. 106). Still he may call evidence to show that the alleged damage was not the consequence of any act or default on his part, but is due to some entirely extraneous cause. Thus if the plaintiff establishes a loss of trade or custom, the defendant may endeavour to prove that such loss is not due to him; and for this purpose he may show that there was at the material date a strike or other crisis in the trade, or a new shop opened in opposition close by, or some unpopular change in the management of the

plaintiff's business. Again, if two similar torts be committed independently about the same date by two different persons, each is only liable for the injury which he himself occasioned, and each will therefore try and show that any injury proved was caused, or mainly caused, by the other. Thus where A. circulated 500 libellous leaflets, and also advertised the same libel in a newspaper, and the person libelled brought one action against A. and another against the proprietor of the newspaper, the latter defendant was allowed to prove that the damage sustained by the plaintiff was in fact due to the circulation of the leaflets, with which he was not concerned, and not to the subsequent appearance of the same libel in his newspaper (*Harrison* v. *Pearce*, 1858, 1 F. & F. 567; 32 L. T. (Old S.) 298; and see *Wyatt* v. *Gore*, 1816, Holt, N. P. 299).

In actions of libel and slander the defendant is permitted, if he dare, to assert that his words could not possibly have injured the plaintiff's character, because his reputation was so bad already that nothing could make it worse. This is, of course, a very dangerous line to take, and one which often aggravates rather than mitigates the amount of the damages recovered. See further as to this under heading 3. *Plaintiff's general character.*

2. *The conduct of the plaintiff* in the litigation, or in the events which led up to and caused the litigation, is generally admissible in mitigation of damages. Thus if the defendant can show that the action is not brought genuinely with the object of recovering reasonable compensation for a loss actually sustained, but is brought to levy blackmail on the defendant, or for some political motive, or to assist someone else to bring another action hereafter, or to advertise the plaintiff's goods, or in some other way to gratify the personal vanity or spite of the plaintiff, the jury will award but small damages; for they will regard the action as one that ought never to have been brought. So if the plaintiff has himself attacked the defendant and so provoked him to commit the assault or to publish the libel complained of, or otherwise invited or challenged the commission of the act for which he now claims damages. "There can be no set-off of one libel or misconduct against another: but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct, and the degree of respect he has shown for the feelings of others" (per Blackburn, J., in *Kelly* v. *Sherlock*, 1866, L. R. 1 Q. B. 698; and see *Fraser* v. *Berkeley*, 1836, 7 Car. & P. 621). Again, if the plaintiff has asserted his rights harshly or with undue severity, if he acted indiscreetly or unbecomingly in the matters which led up to and brought about the litigation, these circumstances will tend to mitigate the damages, *e.g.* where the plaintiff has by his own innocent but foolish conduct subjected himself and others to misconception; as in *Davis* v. *Duncan*, 1874, L. R. 9 C. P. 396, and *Harnett* v. *Vise and Wife*, 1880, 5 Ex. D. 307.

3. *Plaintiff's general character.*—Evidence of the plaintiff's *general* bad character—*i.e.* in matters wholly unconnected with the litigation—is, as a rule, inadmissible. Even a "welcher" or a company-promoter is entitled to recover full compensation if he is knocked down by an omnibus in the street, or injured in a railway accident. If the defendant owes the plaintiff £500, the plaintiff is entitled to recover that amount, whether his private character be good or bad. There is an exception, however, in the case of actions of defamation where the plaintiff is seeking compensation for injury to his reputation. Here, if the defendant justifies, the plaintiff's character comes, of course, directly in issue. But even where the defendant does not venture to justify, he is allowed, under certain restrictions, to give evidence of the plaintiff's general bad character.

Such evidence can only be given in mitigation of damages; it is no answer to the action (*Wood* v. *Earl of Durham*, 1888, 21 Q. B. D. 501). And only general evidence of the plaintiff's bad character may be given with this object; the defendant may not go into particular instances: still less may he prove the existence of a general report or rumour that the plaintiff had been guilty of the alleged or any similar misconduct (*Scott* v. *Sampson*, 1882, 8 Q. B. D. 491). And now, general evidence of the plaintiff's bad character cannot be given at the trial without the leave of the judge, unless the defendant has justified, or unless, seven days at least before the trial, he has given the plaintiff particulars under Order 36, r. 37, of the matters which the defendant intends to prove. This rule in no way alters the law laid down in *Scott* v. *Sampson*, *supra*; except that it absolves the defendant from the necessity of pleading such matters in his Defence. Evidence of rumours, and evidence of particular facts and circumstances, tending to show misconduct on the part of the plaintiff, cannot be received in reduction of damages, even though particulars have been given under Order 36, r. 37. Only evidence of his general bad character is admissible. Order 36, r. 37, made nothing admissible which was not admissible before.

Note, however, that this rule in no way restricts the right of cross-examination; the following rule of the same Order attempts to do that: rule 37 is expressly confined to evidence tendered by the defendant in chief. In every action, if the plaintiff goes into the witness-box, he may be cross-examined "to credit" on every detail of his previous life which can conceivably affect his credit. But, unless such details are relevant to the issue, the defendant must accept the plaintiff's answer; he cannot call evidence in chief to contradict it.

4. *The conduct of the defendant.*—If the defendant acted honestly (though tortiously) on a reasonable suspicion, or under a mistaken impression as to his rights or as to the facts, the jury will naturally (though perhaps illogically; see vol. iv. p. 94) award less damages against him than if he acted fraudulently or maliciously or deliberately with his eyes open. For this purpose the defendant may generally show "the surrounding circumstances" which induced him to act as he did. But see Order 36, r. 37, above. The absence of all malice ought to tell in the defendant's favour. So, too, the defendant's subsequent conduct may tend to mitigate the damages, *e.g.* if he has shown himself open to argument, has listened to any explanations offered him, has restored the goods which he removed, has expressed regret or apologised for his mistake, has stopped the sale of any book or paper complained of, and done all in his power to remedy or reduce the mischief caused by his act (see *Gathercole* v. *Miall*, 1846, 15 Mee. & W. 319; *Smith* v. *Scott*, 1847, 2 Car. & Kir. 580; *Davis* v. *Cutbush*, 1859, 1 F. & F. 487; *Harle* v. *Catherall*, 1866, 14 L. T. 801). In any action of libel "the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in Court during the trial" (per Lord Esher, M. R., in *Praed* v. *Graham*, 1889, 24 Q. B. D. at p. 55). The same rule would hold in an action of slander. As to an apology, see APOLOGY, vol. i. p. 265.

5. *The conduct of third persons.*—Evidence of the sayings and doings of third persons is, as a general rule, inadmissible, even in mitigation of damages, except when such evidence is necessary to explain the conduct of the parties to the action in the course of, or in the circumstances leading up to, the litigation. If such evidence throws no light on the conduct of either party in reference to the present litigation, but bears only on some

other past or possible litigation, it is inadmissible. Thus the fact that several other persons besides the defendant have on other occasions uttered the same slander as he did, is inadmissible even in mitigation of damages. But if the defendant heard the slander from A., and believed it to be true, and, when repeating it, named A. as his informant, then these facts may be given in evidence in mitigation of damages, for they place the defendant's act in a better light (*Tidman* v. *Ainslie*, 1854, 10 Ex. Rep. 63). A.'s slander is not in itself material, but it leads up to and explains the conduct of the defendant in the particular case under investigation. But if A.'s conduct is wholly unconnected with the present litigation or the conduct of either party therein, it cannot be given in evidence. That the plaintiff might have, but has not, brought other actions for similar wrongs is wholly immaterial. He may sue whom he pleases, and when he pleases. Thus in an action of libel, evidence that others had previously published similar libels on the plaintiff, and have not been sued, is not admissible. It is no justification for the defendant's republication; still less is it any evidence of the truth of such charges (*R.* v. *Newman*, 1853, 1 El. & Bl. 268). It is wholly immaterial that the plaintiff omitted to contradict or complain of such previous publications (*R.* v. *Holt*, 1793, 5 T. R. 436; *Pankhurst* v. *Hamilton*, 1886, 2 T. L. R. 682; and per Maule, J., in *Ingram* v. *Lawson*, 1839, 9 Car. & P. at p. 333). If, however, the libel sued on in the present action purports to be derived from a certain newspaper named in it, the defendant may prove in mitigation of damages that a paragraph to the same effect had appeared in that newspaper (*Wyatt* v. *Gore*, 1816, Holt, N. P. 303). But this is only admissible as showing that the defendant acted innocently and without malice: it comes really under head 4. above (see *Hunt* v. *Algar*, 1833, 6 Car. & P. 245; *Creevy* v. *Carr*, 1835, 7 Car. & P. 64; *Davis* v. *Cutbush*, 1859, 1 F. & F. 487). And, generally, if the present defendant is liable, the fact that someone else is liable to be sued in another action for a similar wrong is not only no defence to the present action; it is not admissible even in reduction of damages. Evidence that such other actions have in fact been brought was also inadmissible for every purpose at common law. But in an action against a newspaper, such evidence is now admissible in reduction of damages by virtue of sec. 6 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), which enacts that "at the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought."

Mittimus.—See EXEMPLIFICATIONS.

Mixed Actions.—See ACTIONS.

Mixed Chalice.—See COMMUNION (HOLY), vol. iii. at p. 147.

Mixed Commissions is the name given in diplomacy to delegates of two or more States charged to draw up a scheme or project for

the settlement of the details of a dispute or difference where the principle of the arrangement is already agreed upon. The term is also sometimes loosely applied to permanent international commissions, such as the Danubian *commission riveraine*, created under the Treaty of Paris, 1856 (Arts. 16 to 18), which, however, does not use the term. It is well to confine the term to the meaning it has acquired in diplomacy of a temporary international commission only.

Examples of mixed commissions in this sense have been numerous of late years. The cases they are most frequently appointed to deal with are the demarcation of frontiers, such as the Anglo-French, the one at present sitting in Paris in connection with West Africa; the fixing of indemnities to subjects of the one State through incapacity of the Government of the other State to protect such subjects against acts contrary to the law of nations, as in the case of Hayti in 1885, after the disturbances there: as to the distribution of booty after joint hostilities, as when after the Chinese war a mixed commission was appointed by the convention of February 22, 1860, composed of one Englishman and one Frenchman, who, before entering on their functions, were to choose each one person, one of whom was to be fixed upon as umpire by drawing lots in case they disagreed. Famous mixed commissions were those which were appointed after the Geneva arbitration in the *Alabama* case (*q.v.*), in accordance with the Treaty of Washington of May 8, 1871.

Professor Kamarowsky sums up the rules as to formation and composition of mixed commissions as follows:—

Commissions are only formed with the consent of the parties directly concerned, set forth in a preliminary treaty containing the object of the commission, the mode of procedure to follow, and the rules which are to govern the material to be laid before it. Claims submitted by individuals cannot be brought before mixed commissions unless the claimants have previously exhausted all the legal means afforded by the national tribunals of the defendants.

The commissioners are named by the sovereign Power; in the United States by the President, upon the advice and consent of the Senate. They are ordinarily chosen to an odd number, most often three, sometimes five: each party one or two. The commissioners then name an umpire, whose nomination is characterised by different modes of procedure; but treaties are rarely completely mute upon the way in which the umpire has to be elected. Sometimes, if the commissioners are not unanimous as to the choice, each party names one person, and then the final choice is determined by lot. Sometimes umpires are only elected to decide particularly upon a special question upon which the commissioners cannot agree.

Ordinarily the umpire is simply designated as "a third person"; but sometimes it is explicitly said that he has to be elected from among the citizens of a third neutral State, which corresponds better to the idea of arbitration.

In the more recent conventions the choice of an umpire has been confided to a neutral sovereign, or his diplomatic agent accredited to the Government of one of the contracting parties. This way of designation seems to us the most just, provided always that the choice, as we have pointed out, falls upon a subject of a third country.

The Governments name to the commissions special counsel or agents, ordinarily one by each party. The duty of these counsel or agents is to "lend their assistance to the commissioners to present and support the claims of their Government, to reply to the questions of the opposite party,

and in general to be the representatives of their State, and then the examination of the resolution of all the questions" (*Le Tribunal International*, trad. franc. Lacointa, Paris, 1887).

Mixed Fund.—If a trustee or other person holding money in a fiduciary character mixes and confuses the property which he so holds with his own money, so that they cannot be separated with perfect accuracy, he is liable to his *cestui-que trust* for the whole (per Stuart, V.C., in *Cook* v. *Addison*, 1869, L. R. 7 Eq. 470).

The rule in *Clayton's* case, 1816, 1 Mer. 572; 15 R. R. 151, which in the case of a current account presumes that it is the sum first paid in that has been first drawn out, does not apply between a trustee and his *cestui-que trust*, where the former has mixed his own and trust moneys in his banking account, and afterwards drawn out sums in the ordinary way by cheques; in such a case the trustee is presumed to have drawn out his own money in preference to the trust money (*In re Hallett's Estate, Knatchbull* v. *Hallett*, 1880, 13 Ch. D. 696). The rule in *Clayton's* case, *supra*, is, however, applicable as between two *cestuis-que trust* (*In re Hallett*, *supra*, per Fry J.; *Hancock* v. *Smith*, 1889, 41 Ch. D. 456). See BLENDED FUND.

Mixed Government.—A form of government, such as that in this country, which combines the three elements of a monarchy, an aristocracy, and a democracy, is sometimes termed a mixed government.

Mixed Larceny.—See LARCENY, vol. vii. at p. 314.

Mixed Questions of Law and Fact—Cases in which the jury is to find the particular facts and the Court is to decide upon the legal quality of those facts (Wharton, *Law Lexicon*). Reasonable notice, for example, is a mixed question of law and fact; the situation and places of the parties, the post hours, and other matters of that kind, are facts to be ascertained by the jury; but whether under the particular circumstances something was done in reasonable time, is a question of law in which the judge should direct the jury (per Grose, J., in *Darbishire* v. *Parker*, 1805, 6 East, 9). See FACT.

Mixed Tithes.—See TITHES.

Mixed Tribunals is the name given to an international jurisdiction introduced into Egypt in 1878 (*Règlement*, 10th November 1874) by Ismail Pasha, under the guidance of his able minister Nubar Pasha. The details had been settled in protracted negotiations beforehand with the various Christian Powers of Europe. These tribunals, though they partly superseded the existing consular Courts, at the same time made the administration of justice quite independent of the executive government of Egypt.

British consular jurisdiction to the extent of the competence of these new international Courts was accordingly suspended by an Order in Council dated 5th February 1876.

The resulting state of things is that at present there are in Egypt three different kinds of jurisdiction. The native Courts decide all cases between natives, the consular Courts still deal with matters between persons of the same nationality, and cases between persons of different nationalities, whether native or European, belong to the mixed Courts. These arrangements do not affect criminal charges, which when against a native must be brought in the native Court, and when against a European in his consular Court.

Mixed Courts of First Instance sit at Alexandria, Mansourah, and Cairo; and the Court of Appeal, whose decisions are final, sits at Alexandria. On the Court of Appeal each of the six great Christian Powers is represented by one judge (except France, which is represented by two), and in the Courts of First Instance by two judges. Of the smaller Powers some have one and others two judges in the Court of First Instance. In the Court of Appeal, Belgium and Greece also have each a judge, the latter on account of the large Greek colony settled in Egypt, the former on behalf of the secondary States of Europe.

The Courts of First Instance are each composed of five judges—three Europeans and two natives—and the two divisions of the Appeal Court are composed each of five European and three native judges.

The Courts were instituted for a period of five years only, and, except for an interval, during which Great Britain only renewed from year to year, the institution has been continued for periods of five years, the current one of which expires in February 1899.

When the new jurisdiction was created fifteen Powers under the capitulations were exercising independent authority within the Khedive's dominions. Egypt was then governed in Eastern fashion, and the only trustworthy justice was that of the consular Courts. The native tribunals have since been reorganised under the management of Sir John Scott, who is strengthening them as far as possible by the appointment of Europeans.

Though a time may come when the mixed Courts will be superfluous, frequent proposals to supersede them seem premature, and have probably been dictated rather by the too great zeal of the judges than any shortcoming in the performance of their duties.

The absence of any immediate higher authority to interpret or amend the organic charter has encouraged a tendency on the part of the Appeal Court to extend its jurisdiction.

An able, though somewhat biassed, article in the *Times* on the working of the Mixed Tribunals, by a correspondent at Cairo, bears on this subject:—

> The principle of mixed nationality has completely given way to the theory of mixed interest. The different nationality of the parties is no longer essential. The competency or incompetency depends on whether there is a mixed interest involved in the suit, and the presence or absence as party of the person representing the mixed interest does not affect the question. A native bankruptcy, for instance, is declared mixed if there is a single foreign creditor. Moreover, the sole appearance of a foreigner in "any way in" a case, as, for instance, the joinder of the clerk of a mixed tribunal for formal purposes, transfers a suit between natives to the mixed Courts. A native creditor has at the beginning of his suit only to join a foreigner to his native debtor. If the foreigner retires from the case it still remains "mixed." . . . Companies whose shares are held by foreigners are held equally mixed in spite of Articles 46 & 47 of the *Code de Commerce*, which declares that no company can exist save by virtue of a firman of the Khedive approving the conditions of the articles of association, and authorising its establishment: "companies that may be founded in Egypt shall all be of Egyptian nationality, and must all have their office there" (Art. 47). Even if the statutes of the company declare it to be native and under native jurisdiction, the mixed jurisdiction is

still claimed and established. . . . In the matter of taxes the Court has declared itself competent to examine whether a tax is legal, whether its amount is excessive, whether even, if the tax is not excessive, the administration has not misapplied the law in such a way as to require reparation or restitution (*Times*, April 17, 1897).

The Court in the recent case raised by the minority of the *Caisse de la Dette Publique* assumed the right to judge the Egyptian Government even in its capacity of sovereign government on a matter of the application of its revenues, under Article 11 of the charter, which gives the Courts jurisdiction "where an acquired right of a foreigner under the civil code has been injuriously affected by an act of administration," though it declares them incompetent "to interpret or arrest the execution of an administrative measure." The meaning of neither the first part of the article nor the restriction is clear. Moreover, a jurisdiction over acts of administration, which may have been necessary or desirable when Egyptian native rule was uncontrolled, has now ceased to have a *raison d'être*.

[*Authorities.*—Feraud-Giraud, *Les Justices Mixtes dans les pays hors de Chrétienté*, Paris, 1884; Marten's *Des Consuls et de la juridiction consulaire en Orient*, Paris, 1873; Kamarowsky, *Le Tribunal International*, trad. franc. Lacointa, Paris, 1887; Twiss, *Law of Nations in Time of Peace*, ed. 1884, Oxford, 1884; Holland, *The European Concert in the Eastern Question*, pp. 102, 103, 128–147.]

Mobilia sequuntur personam.—See PRIVATE INTERNATIONAL LAW.

Mock Auction.—See AUCTION.

Moderate Speed.—This term in Art. 16 of the Rules for Preventing Collisions at Sea, of 27th November 1896, is a relative term, depending upon the circumstances (*The Beta*, 1884, 9 P. D. 134); a vessel must, however, reduce her speed so far as she can consistently with keeping steerage away (*The Zadok*, 1883, *ibid.* 114). See COLLISIONS AT SEA, vol. iii. at p. 105.

Moderate Terms.—An order for goods "on moderate terms" was held a sufficient memorandum within sec. 17 of the Statute of Frauds (*Ashcroft* v. *Morrin*, 1842, 4 Man. & G. 450). See SALE OF GOODS.

Modus decimandi.—Any means whereby the general law of tithing was altered and a new method of taking tithes was introduced was called a *modus decimandi*, or simply a *modus*. It frequently took the form of a fixed money payment. See TITHES.

Mohammedan Law.—A Mohammedan living in the Queen's dominions is for many purposes subject to our law; but in British India (*q.v.*) and some other parts of the empire the Mohammedan law holds its ground as a personal or tribal law, which is applied in questions relating to marriage, inheritance, etc. All followers of the Prophet acknowledge the authority of the *Qu'ran* or *Koran*; but the doctrine of that book is religious

rather than legal; in many points it is superseded and even contradicted by the great jurists of Islam. On the death of Mohammed, a dispute concerning the succession to the Caliphate brought about a division of Islam into two sects, the Shiahs and the Sunnis: these sects are subdivided into schools which are at variance in regard to the rules of succession, etc. Of the four Sunni schools the most important is that founded by Abu Hanifa (died A.D. 768) and his disciples Abu Yusuf and Mohammed. The teaching of this school is accepted by the majority of Indian Mussulmans, by the Afghans, Turkomans, Turks, and Egyptians. The *Hedaya* is one of the most celebrated treatises on Hanafi law: it was written by Burhan-ud-din Ali ibn Abu Bakr, who died A.D. 1196. The Mogul Emperors were members of the Hanafi school; their views are embodied in the *Fatawa-Alamgiri*, compiled by order of Aurangzib. The Shiah sect divides into three branches; the Asna-Asharya branch includes the Akhbari and Usuli schools. The *Sharaya-ul-Islam*, a book of Akhbari doctrine dating from the thirteenth century, was used by Sir W. Jones and Mr. Baillie in compiling their Digests. These sectarian divisions make it almost impossible to harmonise or codify the law administered among Mussulmans in India. As compared with Hindu law (*q.v.*) the Mohammedan law is more favourable to individual liberty; the distinction between ancestral and self-acquired property is not observed. An owner may usually dispose of one-third of his property by will. Some Mohammedans follow Hindu customs in regard to their property. Great importance attaches to the law of *Wakf* or religious endowment; the decisions of the Privy Council dealing with this subject have been keenly discussed in India.

[*Authorities.*—The sources of Mohammedan law are described in the Introductions to the two volumes of Mr. Justice Ameer Ali's *Mohammedan Law*. Sale's translation of the Koran is well known; there is also a translation by E. H. Palmer in the *Sacred Books of the East*, vols. vi. and vii. The *Hedaya* was translated by Charles Hamilton. See also Baillie's *Digests*, W. H. Macnaghten's *Principles and Precedents*, and Sir R. K. Wilson's *Digest of Anglo-Muhammadan Law*.]

Molest.—A covenant in a separation deed between husband and wife by one of the parties not to molest the other is not broken unless there is both an annoyance and an intention to annoy (*Hunt* v. *Hunt*, 1897, 67 L. J. Q. B. 18). In that case it appeared that the husband, who had covenanted not to molest his wife, had gone to Texas for the purpose of instituting, and that he did in fact there institute, divorce proceedings, and this, it was contended, constituted molestation. The Court of Appeal, however, held that by themselves these proceedings did not amount to molestation, there being no intention to annoy the wife. See the earlier cases on the subject discussed in the judgments of the Court in *Hunt* v. *Hunt*, *supra*.

As to molestation in other cases, see COMBINATION; CONSPIRACY: INTIMIDATION.

Money Bill.—In certain important respects the procedure on a money bill differs from that on other bills in Parliament. According to constitutional practice, a money bill can only originate in the House of Commons and in a Committee of the whole House; further, it must be initiated on a recommendation from the Crown. From a very early period

the House of Commons claimed the exclusive right to deal with supplies. On two occasions in the seventeenth century, while admitting the right of the Lords to reject a money bill, the Commons denied their right to alter or amend such a measure. The question of the respective powers of the two Houses in relation to this subject arose again in 1763, when the Lords opposed the third reading of the Wines and Cider Duties Bill, but much more prominently in 1860 over the Paper Duties Repeal Bill. This bill having passed the House of Commons was rejected in the House of Lords, a proceeding which excited much controversy, and was the occasion of the three celebrated resolutions of Lord Palmerston. These were—(1) "That the right of granting aids and supplies to the Crown is in the Commons alone, as an essential part of their constitution; and the limitation of all such grants, as to the matter, manner, measure, and time, is only in them"; (2) "That although the Lords have exercised the power of rejecting bills of several descriptions relating to taxation by negativing the whole, yet the exercise of that power by them has not been frequent, and is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant the supplies and to provide the ways and means for the service of the year"; and (3) "That, to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has in its own hands the power so to impose and remit taxes and to frame Bills of Supply, that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate." The question was again raised during the discussion on the Finance Bill of 1894. In the House of Lords the Lord Chancellor (Lord Herschell) pointed out that although the abstract right of the Lords to reject a money bill was clear, such a proceeding would certainly not be in accordance with well-established constitutional practice; and he further stated that the Privy Council some years previously had been asked whether it was the constitutional right of the Upper of the two Chambers in one of the Australian colonies to amend a money bill, and had answered that as the two Houses appeared to have been established upon the same basis as regards their mutual relations as the House of Lords and the House of Commons, it would be unconstitutional in the Upper Chamber to amend such a bill. This opinion of the Privy Council could not indeed, as was pointed out, legally affect the relations of the two Houses in this country, but it shows the settled parliamentary practice. On the same occasion the Marquis of Salisbury, while not disputing the necessity of the accepted practice, yet thought it important, in view of the changes which had come over the constitution, that that House shall rigidly adhere to its legal powers (Hansard, vol. xxvii. 4th series, pp. 985, 1222 *et seq.*).

In its introductory phraseology a money bill also differs from an ordinary bill. It commences with an address to the sovereign by the Commons, stating that they have given and granted the several duties therein mentioned for the use of Her Majesty; in this again we see reflected the exclusive right of the Commons to initiate such legislation. See HOUSE OF COMMONS.

[*Authorities.*—May, *Constitutional History*, 3rd ed. vol. ii. pp. 103 *et seq.*; Anson, *Law and Custom of the Constitution, Parliament*, 2nd ed., pp. 252 *et seq.*]

Money, Costs, Charges, and Expenses.—"When the Legislature mentions 'money, costs, charges, and expenses' (s. 18, 1 & 2

Vict. c. 110), it means money decreed or ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officers of the Court. It is unnecessary to decide the point, but I am of opinion that, with respect to costs, it is enough if they are ascertained by the officer of the Court, and that it is not necessary that there should be any order to pay after they are taxed" (per Parke, B., in *Jones* v. *Williams*, 1841, 10 L. J. Ex. 253, 257).

Money Counts.—See ASSUMPSIT; PLEADING, *Before the Judicature Acts.*

Money Due.—Money receivable under a policy of insurance on his own life was held to pass under a bequest by a testator of "any money that he might die possessed of, or which might be due and owing to him at the time of his decease" (*Petty* v. *Willson*, 1869, L. R. 4 Ch. 574). Damages recovered in an action by an executor for a breach of covenant committed in the lifetime of his testator will also pass under a bequest by the testator of "money due" (*Bide* v. *Harrison*, 1873, L. R. 17 Eq. 76); but freight earned on a voyage not completed till after the death of the testator was held not to pass under such a bequest (*Stephenson* v. *Dowson*, 1840, 3 Beav. 342). In *Martin* v. *Hobson*, 1873, L. R. 8 Ch. 401, Mellish, L.J., said (p. 406): "I think it very likely that the expression 'sum and sums of money due and owing to me' would be held to extend beyond debts properly so called, and might include all sums of money which there was a present right to receive, though the administrations which were necessary to be taken out before they could be received had not been taken out. But in order to come within this description the subject must be something which at the death of the testatrix could be described as a sum of money."

A bequest by a testatrix to her debtor of all moneys owing from him was held, where there were cross debts, a bequest of the balance (*Ganly* v. *Dowling*, 1880, 5 L. R. Ir. 628).

A bequest of "all money due on mortgage" does not pass money charged on property (*Earl Poulett* v. *Hood*, 1866, 35 Beav. 234).

Money, Goods, or Chattels.—Choses in action are included in the phrase "money, goods, or chattels" in Order 57, r. 1, as to interpleader proceedings (*Robinson* v. *Jenkins*, 1890, 24 Q. B. D. 275).

Money in Hand.—"There is no real difference between 'money in hand' and 'ready money'" (per Lord Lyndhurst, L.C., in *Parker* v. *Marchant*, 1843, 12 L. J. Ch. 385). In that case it was held that balances at his banker's passed under a gift by the testator of his "ready money." See, READY MONEY.

Money in the Funds.—The bonds of a foreign Government, though guaranteed by this country, have been held not to be included in the phrase "moneys in the funds" (*Burnie* v. *Getting*, 1845, 2 Coll. 324).

Money Lent.—The form of common indebitatus count in use under the Common Law Procedure Act, 1852, in an action to recover money lent by the plaintiff to the defendant (see COUNT IN DECLARATION; ASSUMPSIT; and DEBT, ACTION OF) was available for the recovery of a debt arising out of a loan of money on a simple contract, and may now, under the like circumstances, be used in a statement of claim specially indorsed on a writ pursuant to R. S. C. 1883, Order 3, r. 6 (see Bullen and Leake's *Precedents of Pleadings*, 5th ed., pp. 52, 77, 288). Such form was not applicable in cases where the promise to pay was secured by a deed containing a covenant of payment (*Mathew* v. *Blackmore*, 1857, 1 H. & N. 762), but in the case of a mortgage where the deed contained no express or implied covenant to repay the money, a count of this kind was good (*Yates* v. *Ashton*, 1843, 4 Q. B. 182). Where money is lent without any definite agreement as to the period of credit, a debt arises which is payable at once and without any demand (*Norton* v. *Ellam*, 1837, 2 Mee. & W. 461, 464, and see *R.* v. *Peters*, 1886, 16 Q. B. D. 636).

Money lent for an illegal or for an immoral purpose cannot be recovered by action (*Cannon* v. *Bryce*, 1819, 3 Barn. & Ald. 179; 22 R. R. 342; *M'Kinnel* v. *Robinson*, 1838, 3 Mee. & W. 434; *Pearce* v. *Brooks*, 1866, L. R. 1 Ex. 213), but it is no answer to a claim for money lent that the borrower contracted the loan for the purpose of paying bets (*Hill* v. *Fox*, 1859, 4 H. & N. 359; *Ex parte Pyke*, 1878, 8 Ch. D. 754).

Notes, bills, and other securities given for the repayment of money knowingly lent for gaming or betting, or lent at the time and place of such play to any person gaming or betting are by sec. 1 of 5 & 6 Will. IV. c. 41, amending 9 Anne, c. 14, deemed to be given for an illegal consideration. See GAMING (AND WAGERING).

By sec. 1 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), all contracts, whether by specialty or otherwise, entered into by infants for the repayment of money lent or to be lent are absolutely void; and by sec. 5 of the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4), it is further provided that if any infant, who has contracted a loan which is void in law, agrees after he comes of age to repay it, such agreement and any instrument, negotiable or other, given for carrying into effect such agreement or in respect of such loan, shall be void absolutely as against all persons.

Interest cannot in general be recovered upon money lent unless there is a special agreement for the payment of interest or circumstances importing an agreement to that effect can be proved (*Calton* v. *Bragg*, 1812, 15 East, 223; 13 R. R. 451; *Page* v. *Newman*, 1829, 9 Barn. & Cress. 378; 33 R. R. 204).

In the case of a breach of contract to lend money, the measure of damages is the loss sustained by the breach, and unless loss is shown the damages may be merely nominal (*South African Territories* v. *Wallington*, [1897] 1 Q. B. 692; affirmed H. L. 14 T. L. R. 298).

[*Authority.*—See further Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 288.]

Money Order.—See POST OFFICE ORDERS.

Money Paid.—The form of *common indebitatus count* in use under the Common Law Procedure Act, 1852, for "*money paid*" stated that the plaintiff's claim was for money payable by the defendant to the plaintiff for

money paid by the plaintiff for the defendant at his request. In order to support this count it was essential that there should have been an actual payment of money, or that which is equivalent to it, to a third party (*Porter* v. *Butcher*, 1829, 10 Barn. & Cress. 329, 346), and that such payment was made at the defendant's request, express or implied (*Stokes* v. *Lewis*, 1785, 1 T. R. 20; *Exall* v. *Partridge*, 1799, 8 T. R. 308, 310; *Leigh* v. *Dickeson*, 1884, 15 Q. B. D. 60, 64). A request will be implied where the plaintiff has been compelled by law to pay, or being compellable by law to pay, has paid money which another is ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability (see Leake on *Contracts*, 3rd ed., p. 56; *Grissell* v. *Robinson*, 1836, 3 Bing. N. C. 10, 15; *Moule* v. *Garrett*, 1872, L. R. 7 Ex. 101; *Edmunds* v. *Wallingford*, 1885, 14 Q. B. D. 811, 814).

Money paid by the plaintiff to a third party against the payment of which the defendant has agreed to indemnify the plaintiff may in general be recovered as "*money paid*" (*Lewis* v. *Campbell*, 1849, 8 C. B. 541).

Where money has been paid for an illegal purpose or in execution of an illegal act, it cannot be recovered (see ILLEGAL PRACTICES; GAMING (AND WAGERING)).

The Gaming Act, 1892 (55 Vict. c. 9, s. 1), renders null and void any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (8 & 9 Vict. c. 109), and no action can be brought to recover any such sum of money (see *Tatam* v. *Reeve*, [1893] 1 Q. B. 44; *Carney* v. *Plimmer*, [1897] 1 Q. B. 634).

For instances of cases where an action will lie for money paid, and for a form of pleadings in such action, see Bullen and Leake's *Precedents of Pleadings*, 5th ed., pp. 290, 792.

Money, Payment into Court.—See PAYMENT INTO COURT.

Money Received.—Commission agreed to be paid by a principal on "any money received" by him was held to have been earned and payable to the agent, although no money was in fact received by the principal, the agent having performed his part of the contract, and the negotiations having failed owing to the principal's own default (*Fisher* v. *Drewett*, 1878, 48 L. J. Ex. 32).

Money Received, Count for.—The common indebitatus count for money received by the defendant to the use of the plaintiff was the most comprehensive of all the common indebitatus counts in use prior to the coming into operation of the Judicature Acts. It was applicable in cases where the defendant had received money which in justice and equity belonged to the plaintiff, under circumstances which rendered the receipt of it a receipt by the defendant for the use of the plaintiff (*Moses* v. *Macferlan*, 1760, 2 Burr. 1005; and see notes to *Marriot* v. *Hampton*, 2 Smith's *L. C.*, 10th ed., p. 410; and Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 44). The use of this count was restricted to cases where the defendant had received money, but where a defendant had received a cheque or a country bank note expressly as money the count was held good (*Spratt* v. *Hobhouse*, 1827, 4 Bing. 173; *Pickard* v. *Bankes*, 1810, 13 East, 20). It

was also held to apply in a case where the defendant had received foreign money for the use of the plaintiff (*Ehrensperger* v. *Anderson*, 1848, 3 Ex. 148); and where money was allowed in a settlement of account by a set-off of mutual debts, although no money actually passed it was treated as money received (see *Standish* v. *Ross*, 1849, 3 Ex. 527; *Gingell* v. *Purkins*, 1850, 4 Ex. 720).

An action for money received will lie to recover money paid by the plaintiff to the defendant by mistake of fact (*Milnes* v. *Duncan*, 1827, 6 Barn. & Cress. 671; *Kelly* v. *Solari*, 1841, 9 Mee. & W. 54; *Mills* v. *Alderbury Union*, 1849, 3 Ex. 590; *Durrant* v. *The Ecclesiastical Commissioners*, 1880, 6 Q. B. D. 234). But money paid by mistake of law cannot be recovered (*Bilbie* v. *Lumley*, 1802, 2 East, 469; *Stevens* v. *Lynch*, 1810, 12 East, 38; *Rogers* v. *Ingham*, 1876, 3 Ch. D. 351), and, in general, no action will lie for the recovery of money paid under compulsion of legal proceedings, even though the compulsion was submitted to under a mistake of fact (*Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399).

Money paid by the plaintiff to the defendant for a consideration that has failed may be sued for as money received by the defendant for the use of the plaintiff (*Straton* v. *Rastall*, 1788, 2 T. R. 366, 369).

Money paid by the plaintiff to get rid of duress to his person or to his goods may be thus recovered (*Astley* v. *Reynolds*, 1731, 2 Stra. 915; *Owen* v. *Cronk*, [1895] 1 Q. B. 265); and, where the plaintiff has paid money in discharge of a demand illegally made under colour of an office, he may sue for the recovery of it in this form (*Morgan* v. *Palmer*, 1824, 2 Barn. & Cress. 729; *Steele* v. *Williams*, 1853, 8 Ex. 625).

Where the plaintiff's money has been wrongfully obtained by the defendant, the plaintiff may waive the wrong and claim the money as money received to his use (see *Hambly* v. *Trott*, 1776, 1 Cowp. 371, 376; *Lindon* v. *Hooper*, *ibid.* 414, 419). So also where the plaintiff's goods have been wrongfully sold by the defendant the plaintiff may waive the wrong and recover the price as money received to his use (*Lamine* v. *Dorrell*, 1706, 2 Raym. (Ld.) 1216; *Oughton* v. *Seppings*, 1830, 1 Barn. & Adol. 241; *Neate* v. *Harding*, 1851, 6 Ex. 349; *Rodgers* v. *Maw*, 1846, 15 Mee. & W. 443).

For other instances of cases where an action will lie for money received by the defendant for the use of the plaintiff, see Bullen and Leake's *Precedents of Pleadings*, 5th ed., pp. 292, 302.

Formerly it was unnecessary for the plaintiff in suing upon this count to state the special circumstances which he relied upon as showing that the money received by the defendant ought to be treated as the property of the plaintiff (*Moses* v. *Macferlan*, *supra*), but now that by the R. S. C. Order 19, r. 4, every pleading must contain a statement in a summary form of the material facts on which the party pleading relies, it is necessary to supplement the mere statement that the money claimed was received by the defendant for the use of the plaintiff by showing how the claim in fact arose (see for forms of statement of claim for money received by the defendant for the use of the plaintiff, R. S. O. 1883, App. C. s. iv. No. 2; and Bullen and Leake's *Precedents of Pleadings*, 5th ed., pp. 296–302).

Money's Worth.—Marriage is not a "valuable consideration in money or money's worth" within the meaning of sec. 17 of the Succession Duty Act, 1853 (*Floyer* v. *Bankes*, 1863, 33 L. J. Ch. 1).

Money Value.—A rent having no "money value" within sec. 65 of the Conveyancing Act, 1881, means a rent which, when received, is of no money value (*In re Smith and Stott*, 1883, 31 W. R. 411). A rent of "one silver penny, if lawfully demanded," is a rent having no "money value" within the section (*In re Chapman and Hobbs*, 1885, 29 Ch. D. 1007).

Monition.—A monition, or admonition, is the first and lightest form of ecclesiastical censure, whether to clergymen or to laymen; it is of a preparatory character, and consists in a warning or command to the party served with it to do, or abstain from doing, some act, to be followed, in case of disobedience, by some coercive sanction (per Lord Selborne in *Mackonochie* v. *Lord Penzance*, 1881, 6 App. Cas. 424, at p. 433). Disobedience to it entails the penalties incident to a contempt of Court. Monitions are also issued in ecclesiastical procedure, to warn the party served to do something, or appear and show cause to the contrary; but in a civil ecclesiastical suit it is necessary for the person at whose petition a monition is issued to show an interest in the matter complained of (*Lee* v. *Fagg*, 1874, L. R. 6 P. C. 38). The citation in *Duplex querela* has both monition and an intimation that if the party does not appear and show cause to the contrary, the Court will proceed to do as therein set forth; and a monition for transmission of process in the Court below is part of the procedure in an ecclesiastical appeal (see *Ridsdale* v. *Clifton*, 1876, 1 P. D. 383). Monitions of a disciplinary character are chiefly issued: (1) to enforce residence on a benefice; (2) in connection with suits to restrain ritual alleged to be unlawful, whether under the Church Discipline Act, 1840, or the Public Worship Regulation Act, 1874. In the former case the procedure is governed by the provisions of the Pluralities Act, 1837 (1 & 2 Vict. c. 106). See articles INCUMBENT; PLURALITIES; SEQUESTRATION. Monitions to enforce residence are to be under the hand and seal of the bishop, and to be served personally on the clergyman, by showing him the original and leaving with him a true copy, unless he cannot be found, when a copy must be left at his usual or last known place of residence, another be affixed on the church door of the parish in which such place of residence is situate, another be left with the officiating minister or a churchwarden of that parish, and another be affixed to the clergyman's own church door. The monition, when served, is to be returned into the Consistorial Court, with an affidavit of service, and the monished party may show cause why sequestration should not issue, by affidavit or otherwise (s. 112). The Act provides an alternative method of proceeding for non-residence, that of penalties; and (s. 114) these and the costs of recovering them may be enforced by monition and sequestration, as may (s. 115) all fees, charges, costs, and expenses incurred or directed to be paid by any spiritual person under the provisions of the Act, if unpaid for twenty-one days after demand in writing at his usual or last place of abode; but the bishop must, if required by him to do so, order their taxation. (2) Under sec. 9 of the P. W. R. Act, 1874 (37 & 38 Vict. c. 85), a monition may be issued by the bishop in cases where the parties have agreed that he shall decide the case without appeal, and by the judge, subject to an appeal to the Judicial Committee of the Privy Council, in other cases. The judge has power to suspend the execution of the monition during an appeal; and if he refuses, the issue of an inhibition pending appeal is a matter of discretion; and the execution of the decree will be suspended only if the Appellate Court so orders (*Ridsdale* v. *Clifton*, 1876, 1 P. D. 385). And by sec. 13 obedience to a monition is to be enforced by inhibition from performing any service

of the Church, or otherwise exercising the cure of souls within the diocese for a term not exceeding three months, after which it is to be relaxed only if the incumbent promise in writing to obey it; and if it remains in force for more than three years from the issuing of the monition, or if a second inhibition is issued within three years from the relaxation of the first one, the benefice is avoided, subject to a discretionary power in the bishop to postpone, for some special reason, the date of avoidance for three months. A faculty (*q.v.*) is not necessary for the lawful obedience of a monition issued under the Act (s. 14). A monition may order discontinuance of the matters which are the subject of the charge, and "all practices, acts, matters, and things of the same or a like nature to them" (*Enraght* v. *Lord Penzance*, 1882, 7 App. Cas. 240). It has been held that even if an ecclesiastical offence has been proved, a monition need not be issued if the Court is satisfied that the offence will not be repeated (*Read* v. *Bishop of Lincoln*, [1892] App. Cas. 644, at p. 669). Disobedience to a monition may be punished by suspension (*Martin* v. *Mackonochie*, 1870, L. R. 3 P. C. 409; *Hebbert* v. *Purchas*, 1872, *ibid.* 4. 301; see also *Mackonochie* v. *Lord Penzance*, *ubi supra*).

See PUBLIC WORSHIP REGULATION ACT.

[*Authority.*—Phillimore, *Eccl. Law*, 2nd ed.]

Monmouth.—See WALES.

Monomania.—See LUNACY; MEDICAL JURISPRUDENCE.

Monopoly; Statute of Monopolies.—A monopoly (*μονοπωλία*) exists where the right to sell a commodity is restrained to one or a certain number (11 Co. Rep. 86 *b*). Until 1610 it had been a common practice of the Crown, by charter or letters patent, to grant to subjects an exclusive right to sell, buy, make, work, or use anything within the realm (Bac. *Abr.* tit. "Monopoly"). But it was objected to as an unconstitutional infringement of the common law doctrines as to agreements in restraint of trade and enhancement of price, and as a violation of Magna Carta and later statutes (1 *Co. Inst.* 63; Com. *Dig.* "Trade" D.), and such monopolies were held void by the Courts (case of *Monopolies*, 1601, 11 Co. Rep. 84 *b*). In 1610, James I. issued a declaration against grants of monopolies, and of the benefit of penal laws, and of power to dispense with the law or to compound for forfeitures, pronouncing them contrary to law, and promising that no suitors should thereafter apply for such grants. Notwithstanding the declaration, fresh grants were obtained and put into execution until after the proceedings in Parliament against Sir Giles Mompesson for abuse of patents of monopoly (1620, 2 St. Tri. 1119). In consequence of it the king was forced to assent to the Statute of Monopolies (1623, 21 Jas. I. c. 3), whereby all grants of monopolies were declared illegal and void (s. 1), and the jurisdiction of the Privy Council and Star Chamber with reference to them taken away (3 *Co. Inst.* 182).

The penalties for use of monopolies under such grants are treble damages, and are recoverable in the Courts of common law (21 Jas. I. c. 3, ss. 3, 4).

Since the Revolution it has been the established constitutional

practice not to grant charters or letters patent in respect of matters within the mischief of the Statute of Monopolies. This policy was fixed after the great case of *H. E. I. Co.* v. *Sandys*, 1683, 10 St. Tri. 373, as to the East India Co., though the grant to the H. E. I. Co. of the exclusive trade to India was there upheld. Judicial decisions under the statute are rare, since such a charter, if granted, could be better dealt with by *scire facias* than by action under the statute; and as an illegal monopoly is a public grievance, the Crown are entitled to proceed for its removal without waiting for the parties aggrieved (see *R.* v. *Prosser*, 1848, 11 Beav. 306). The only recent attempt to sue under the statute is *Peck & Co.* v. *Hindes*, 1898, 14 T. L. R. 164. See PATENTS.

The statute has no effect on ancient franchises existing by grant or prescription, *e.g.* of a ferry, or bridge, or market, with the attendant tolls (*Letton* v. *Goodden*, 1866, L. R. 2 Eq. 123; *Great Eastern Rwy. Co.* v. *Goldsmid*, 1884, 9 App. Cas. 927); and the city of London has still in theory exclusive rights of market within seven miles of the city boundary (*ibid.* 936).

So long as liberty of unlicensed printing was not conceded, it was the practice to give grants of the sole right to print the Bible and law books to special corporations or persons, such as the Universities of Oxford and Cambridge, and the right to do so was reserved by the Act (s. 10). See COPYRIGHT.

The Court of High Commission used to take cognisance of the printing of Bibles without authority (case of *Sparkes*, 1631, Star Chamber and High Commission Reports, Camden Soc. Pub. 1886, p. 268), and the sale of unauthorised versions, such as the Geneva Bible (case of *Blagrave*, 1831, *ibid.* 274), or misprinting Bibles (case of *Barker*, 1632, *ibid.* 296, 304, where the king's printer was prosecuted for issuing "the wicked Bible" with "not" omitted in the seventh commandment, and putting "greate asse" for "greatnesse" in Deut. v.). And the right to grant patents was also reserved with respect to the following matters:— Gunpowder, ordnance, grants, offices known as patent offices, alum mines (s. 11), glass-making (s. 13), smelting iron ore (s. 14), and tavern licences (s. 12). These provisions were all repealed in 1863 (26 & 27 Vict. c. 125) and 1883 (46 & 47 Vict. c. 57, s. 113), except secs. 13 and 14, the exemptions under which were local and personal in character.

The Statute of Monopolies also expressly excepted from its provisions—

(1) Privileges, powers, or authorities granted or allowed by Acts of Parliament then in force. No saving was required as to subsequent legislation.

(2) Grants, charters, or letters patent to the city of London or any city, borough, or town corporate in England, or customs used by or within any of them (see Pike, *Hist. Cr.* ii. 102; *City of London's* case, 1610, 8 Co. Rep. 121 *b*).

(3) Corporations, companies, or fellowships of any trade, occupation, or mystery (see Com. *Dig.* tits. "By-law," "Trade."

(4) Companies or societies of merchants in England erected for the maintenance, enlargement, or ordering of any trade or merchandise (see *H. E. I. Co.* v. *Sandys*, above cited).

And all these privileges were allowed to have such force as they possessed at the passing of the Act (21 Jas. I. c. 3, ss. 7, 9).

(5) Letters patent and grants of privileges for a term not exceeding fourteen years, for sole making or working of any manner of new manufacture to the true and first inventor of manufactures which

others at the time of the grant do not use; provided that they are not contrary to law or mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient (21 Jas. I. c. 3, s. 6). This exception is not limited to valid letters patent, and persons who have obtained letters patent for an invention which turns out invalid by reason of defects in the specification or want of novelty are not subject to the penalties of the Statute of Monopolies (*Peck & Co.* v. *Hindes*, 1898, 14 T. L. R. 164). See PATENTS.

There arises from time to time a contention that special Acts giving particular powers to commercial companies constitute a statutory monopoly. They may have the effect of a monopoly and create certain vested rights but are not irrevocable; and are treated as involving obligations to the public, as to the supply of the commodity monopolised and its price, and the right of public bodies to buy out the monopolists. See *Allnutt* v. *Inglis* (1810, 12 East, 527), and the statutes regulating canal, gas, railway and tramway, electric light and water companies.

Under many municipal charters or the equivalent prescription, the freemen of a borough had exclusive rights of trading within the borough, which were not affected or taken away by the surrender and regrant of the charters under the *quo warranto* proceedings in the seventeenth century.

By sec. 14 of the Municipal Corporations Act, 1835, this exclusive right was abolished, and by it, as repeated in sec. 247 of the Municipal Corporations Act, 1882, "notwithstanding any custom or by-law, every person in every borough may keep any shop for the sale of all lawful wares and merchandises by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft for bargain, sale, or otherwise within any borough."

This abrogates not merely the civic but also the guild rights of exclusive trading. It did not in terms apply to all boroughs. But of those not excluded, all except the city of London were brought in for this purpose by sec. 2 (2) of the Municipal Corporations Act, 1883.

In Scots burghs the exercise of certain trades connected with weaving and spinning was made free in 1750 (24 Geo. II. c. 31, s. 23), and in 1846 (9 & 10 Vict. c. 17, s. 1) all persons were permitted to carry on and deal in merchandise, and carry on or exercise any trade or handicraft anywhere in Scotland without being a burgess of a burgh or a guild brother, or member of any guild, craft, or incorporation. In the same year all rights of exclusive trading and also of taking apprentices were abolished in Ireland (9 & 10 Vict. c. 74, s. 1).

In Scotland there survived until 1874, apparently under statutory sanction, a practice of stipulating for a monopoly in favour of the law agent of a feudal superior of the preparation of all deeds affecting or disposing of the landed interests of his vassals (37 & 38 Vict. c. 94, s. 22).

The abolition of exclusive rights to exercise trade and handicraft, coupled with abolition of punishment for acts in restraint of trade and of combinations of workmen to raise wages, has tended to legalise combinations with a view to exclusive exercise of particular crafts by particular societies. In fact, this seems to be the result of *Allen* v. *Flood*, [1898] App. Cas. 1. See TRADE UNION.

The Statute of Monopolies has no effect on monopolies created by the operations of single traders or combinations without the warrant of any grant or licence from the Crown. The legality of such combinations depends on the policy of the law with respect to restraint of trade (Com. *Dig.* "Trade" D. 3). See COMBINATIONS; ENGROSSMENT; FORESTALLING; RESTRAINT OF TRADE.

With the repeal of the specific enactments on this subject in England the law has been left in a somewhat uncertain condition. All that can at present be safely said is (1) that combinations with a view to stifle competition and create monopoly are not criminal, if done with the lawful object of protecting the trade and increasing the profits of the parties to the combination, and not carried out by unlawful means; but that it is uncertain how far the parties to the combination can *inter se* enforce their mutual rights and obligation under the agreement to combine (*Mogul S. S. Co.* v. *M'Gregor*, [1892] App. Cas. 25); (2) that agreements excluding a particular person from competition in a particular trade, even if unrestricted as to the area of competition, are enforceable, if not wider than is needed for the protection of the other parties, nor injurious to public interests (*Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] App. Cas. 535). What is injurious to public interests is a question of the policy of the law, *i.e.* of the particular and shifting notions of the judges of the epoch at which the question arises (*ibid.* p. 564, and per Bowen, L.J., [1893] 1 Ch. 630, 651). In the United States the legal position of "corners," "trusts," and "combines" calculated to create monopolies has been differently treated. There has always been and continues a disposition to treat combinations to create monopolies as criminal conspiracies, the change in English law as to engrossing, etc., not having a counterpart in the legislation of the constituent States; and a Federal Act of 1890, c. 647, was passed to protect trade and commerce against unlawful restraints and monopolies. This Act applies to every contract combination in the form of trust or otherwise in restraint of trade and commerce among the several States or with foreign nations. The scope and effect of the Act is judicially determined in *U. S.* v. *Trans-Missouri Freight Assn.*, 1896, U. S. 290. It applies only to monopolies affecting inter-State or foreign commerce; and monopolies confined to the constituent States are dealt with by State and not by Federal law (*U. S.* v. *Addyston Pipe Co.*, 1897, 78 Fed. Rep. 712). See TRUST (IN AMERICAN LAW).

Monroe Doctrine—A term applied to a principle of the United States polity, opposed to extension of territorial dominion on the American continent by any European State.

The first enunciation of the doctrine took place in 1823, in connection with a proposal of the continental Powers of Europe to hold a congress on the affairs of South America. Mr. Canning, then British Minister of Foreign Affairs, proposed to the United States minister that his Government should join that of Great Britain in protesting against any action which might be taken in consequence of this congress against the South American Republics. The United States, he contended, were connected with Spanish America by their position and political relations. Was it possible that they could see with indifference their fate decided upon by Europe? Had not a new epoch arrived in the relative position of the United States towards Europe which Europe must acknowledge? President Monroe, on communication of Mr. Canning's view, submitted it to the two leading American statesmen of the day, Mr. Jefferson and Mr. Madison. Their replies were in accord with Mr. Canning's suggestion, and the President, in a Message of December 2, 1823, gave expression to them in the form since described by his name.

After stating that the United States Government in certain discussions with Russia had asserted as a principle involving her rights and interests,

"that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Powers," the Message continued:

"The political system of the Allied Powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candour and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.

"With the existing colonies or dependencies of any European Power, we have not interfered, and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States."

In 1845, in connection with the Texas and Oregon questions, the doctrine was expounded afresh by President Polk, who considered the then "existing circumstances of the world a proper occasion to reiterate and reaffirm the principle avowed by Mr. Monroe." The people of the United States could not view with indifference attempts of European Powers to interfere with the independent action of the nations of America. The American system of government was entirely different from that of Europe. Jealousy among the different sovereigns of Europe, lest any one of them might become too powerful for the rest, had caused them anxiously to desire the establishment of what they termed the "balance of power" (*q.v.*). It could not be permitted to have any application on the American continent, the peoples of which alone had the right to decide their own destiny (Annual Message, 1845).

In 1865, after the civil war, the United States, on the occasion of the French intervention in Mexico, were in a position to ensure respect for this doctrine by the only Power which had ever disregarded it.

In 1870, in his second Annual Message, President Grant expressed a hope that the time was not far distant when "in the natural course of events, the European connection with the continent would cease," and, on different other occasions later on, similar wild utterances were made by American Secretaries of State; but it was not till 1895 that the doctrine again formed the subject of a presidential message. The occasion was the still pending Venezuela-Guiana frontier dispute (*q.v.*). President Cleveland, in his Message of December 17, 1895, laid it down that "the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government"; and that "the Monroe Doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected, its just claims enforced."

Mr. Olney, President Cleveland's Secretary of State, in his despatch of August 7, 1895, claimed upon this principle that the Monroe Doctrine was essential to the prosperity of his country. "Thus far," he wrote, "in our history we have been spared the burdens and evils of immense standing

armies, and all the other accessories of huge warlike establishments; and the exemption has largely constituted to our national greatness and wealth, as well as to the happiness of every citizen."

[*Authorities.*—See on the application of the doctrine to the Venezuela question, Barclay, *La Doctrine de Monroe et la question de Venezuela, Rev. de Droit International*, 1896; see also Tucker, *The Monroe Doctrine*, Boston, 1885; Desjardins, *Rev. générale du Droit International Public*, 1896; Theodore S. Woolsey, *Forum*, Feb. 1896; Catellani, Cambridge, 1898.]

Monster.—A monster, that is, a being which has not a human shape, but in any part bears the resemblance of the brute creation, has no inheritable blood, and cannot be heir to any land, although born in marriage. Mere deformity in any part of the body, however, will not constitute a monster in law, provided the being has a human shape (*Co. Litt.* 7 *b*; 2 Black. *Com.* 246; and see Taylor, *Medical Jurisprudence*, 4th ed., vol. ii. pp. 227 *et seq.*). See MEDICAL JURISPRUDENCE, *ante*, p. 305.

The exhibition of a monster for money is said to be a misdemeanour (*Herring* v. *Walrond*, 1681, 2 Ch. Cas. 110, a case of the showing of the embalmed bodies of Siamese twins called Aquila and Priscilla, but in which the judgment says nothing of misdemeanour). There is another case involving a question of the ownership of a live monstrous human being (*Sir Thomas Grantham's* case, 1684, 3 Mod. Rep. 120, but this must be regarded as inconsistent with *Somersett's* case, 1771, 20 St. Tri. 1).

Monstrans de droit (Fr., *Showing of right*).—This ancient and practically obsolete process against the Crown, by a subject, for the restitution of real or personal property (3 Black. *Com.* 275; Bacon's *Abr.* "Prerogative" (E) 475; *In re the Goods of*, Geo. III. 1 St. Tri. N. S. 1284, 1285), is available only where the subject's title appears in the same record with that of the Crown (*Sadler's* case, 4 Rep. 426, 429; Com. *Dig.* "Prerogative" (D) 81), and is not inconsistent therewith (Chitty's *Prerogatives of the Crown*, 353); in which case he may, while confessing the recorded title of the Crown, put in opposition thereto, by way of avoidance, a claim grounded on facts relied on by him, and already acknowledged and established, praying the judgment of the Court thereon, whether the Crown or the subject has the right (3 Black. *Com.* 276; Skinner's *Reports*, 609; Chitty's *Prerogatives of the Crown*, 353). To recover against the Crown, the subject must show that he has a *better* title than that of the Crown (Bacon's *Abr.* "Prerogative" (E) 477), in which case the form of the judgment is *quod manus domini regis amoveantur*, whereby the Crown is instantly out of possession without execution (3 Black. *Com.* 277; Bacon's *Abr.* "Prerogative" (E) 477; Chitty's *Prerogatives of the Crown*, 349, 350). If judgment be against the subject, it is *quod nil capiat per billam suam de monstratione prædicta* (Bacon's *Abr.* "Prerogative" (E) 477, 478). Whether judgment of non-suit can also be pronounced is doubtful, and depends upon whether the complainant is to be regarded as a plaintiff or as a defendant (Chitty's *Prerogatives of the Crown*, 355; Bacon's *Abr.* "Prerogative" (E) 478), the better opinion, however, being, notwithstanding some old authorities (Com. *Dig.* "Prerogative" (D) 82; 2 Salk. 448; Manning's *Exchequer Practice*, "Revenue Branch," p. 87), that he is a mere defendant, and therefore incapable of being non-suited (Chitty's *Prerogatives of the Crown*, 355; Bacon's *Abr.* "Prerogative" (E) 478). The remedy by *monstrans de*

droit was open to any subject, even to the lessee of an outlaw, who cannot maintain trespass (1 Raym. (Ld.) 307). Proceedings were preferred either on the common law side of the Court of Chancery or in the Exchequer (3 Black. *Com.* 276; *Broughton's* case, 1 Skin. 610; Chitty's *Prerogatives of the Crown*, 352; Coke's *Inst.* part iv. 79). They will now, if ever resorted to, be commenced in and come before any Division of the High Court (Judicature Act, 1873, s. 34). *Monstrans de droit* though, *semble*, merely an alternative remedy to petition of right (Chitty's *Prerogatives of the Crown*, 341), was much less expensive and dilatory, and eventually, together with *traverse of office* (as to which see TRAVERSE OF OFFICE), almost superseded it (Chitty's *Prerogatives of the Crown*, 341; 3 Black. *Com.* 276; *Sadler's* case, 4 Rep. 57). This, however, was before the proceedings by Petition of Right (as to which see PETITION OF RIGHT) were simplified by the Petition of Right Act, 1860 (23 & 24 Vict. c. 34). According to some authorities (Skinner's *Reports*, 609; Com. *Dig.* "Prerogative" (D) 81; Bacon's *Abr.* "Prerogative" (E) 475; 3 Black. *Com.* 256), *monstrans de droit* is a remedy given by the common law, while others affirm that it was first conferred by statute (Chitty's *Prerogatives of the Crown*, 3[illegible]; 1 And. 181; 11 St. Tri. 154). At all events, the remedy was greatly enlarged and improved by statute (36 Edw. III. c. 13; 2 & 3 Edw. VI. c. 8), and indeed there appears to be little if any trace of its existence till the statute 36 Edw. III. c. 13, which provided that lands being seised by inquest of office before the escheator, any who will claim the lands seised shall be heard to traverse the office, or, otherwise, shall have a *monstrans de droit*. In the reign of Henry VII., however, by the procurement of the two notorious Privy Councillors, Empson and Dudley, offices were found in secret places, whereby subjects were deprived of this remedy (Coke's *Inst.* part iv. 196, 197). This abuse the king redressed, shortly before his death, by proclamation (*ibid.*), and it was subsequently provided, by 1 Hen. VIII. c. 8, that offices should be found not in secret but in open places, so as to enable persons to give their evidence openly for proof of their rights and tenures.

Month.—The term "month" is ambiguous, "there being in common use two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for 'twelve months' is only for forty-eight weeks; but if it be for 'a twelvemonth,' in the singular number, it is good for the whole year" (2 Blackstone's *Com.* 141).

In Statutes.—Prior to the year 1850, where the word "month" was used in any statute without the addition of the word "calendar," or any other words indicating that calendar month was intended, it was understood to mean lunar month (see *Lacon* v. *Hooper*, 1795, 6 T. R. 224; *Ex parte Humphreys*, 1833, Mont. & B. 413). In *Franco* v. *Alvarez* (1746, 3 Atk. 342), Lord Hardwicke said: "It has been truly said in Acts of Parliament the word 'month' means lunar, except in the case of *Tempus semestre*, with regard to lapse of livings, and the other case of the six months allowed in respect to prohibitions, both upon the same reason, because relative to, and

according to the computation of time in the Ecclesiastical Court." It was held, however, that the six months given to a tenant to redeem under the Statutes of Ejectment were calendar months (*Dowling* v. *Foxhall*, 1809, 1 Ball & B. 193, 196).

In all Acts passed after the year 1850, the expression "month," in the absence of any words showing a contrary intention, means calendar month (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3).

In Rules of Court.—In the Rules of the Supreme Court, and in any judgment or order, or any document which is part of any legal procedure under the rules, the word "month" means calendar month, unless otherwise expressed (R. S. C. 1883, Order 64, r. 1). The same rule prevails in the County Courts (County Court Rules, 1889, Order 52), and though the Bankruptcy Rules do not contain any express provision to the same effect, it may be presumed that the same rule applies by virtue of sec. 3 of the Interpretation Act, 1889.

In Contracts.—In *Hart* v. *Middleton*, 1845, 2 Car. & Kir. 9, it was held that in commercial and mercantile transactions the term "month" meant calendar month according to the custom of the City of London. "In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters, it is so; and I know of no instance to the contrary" (per Pollock, C.B.). See also *A.-G.* v. *Newbury Corpor.*, 1838, 1 Coop. (C. P.) 383; *Turner* v. *Barlow*, 1863, 3 F. & F. 946.

In contracts other than mercantile or commercial the meaning of "month" depends upon the words used in the contract showing the intention of the parties. Where a lease ran "and so on, from six months to six months," and contained a further provision for six *calendar* months' notice to determine the tenancy, it was held that the word "months" throughout the contract meant calendar months (*R.* v. *Chawton*, 1841, 1 Q. B. 247). And see *Lang* v. *Gale*, 1813, 1 M. & S. 111, where the contract showed that in using the word "months" the parties must have meant calendar months, though that was not expressed. But in *Turner* v. *Barlow*, 1863, 3 F. & F. 946, it was held that in a contract which is not mercantile the word "month" means lunar month, unless there is something to show that calendar month was intended. And see *Simpson* v. *Margitson*, 1847, 11 Q. B. 23; *Hutton* v. *Brown*, 1881, 45 L. T. 343. In *Turner* v. *Barlow*, *supra*, it was held that a contract to engrave a picture was not a commercial transaction within the custom of the City of London, and that therefore "months" meant lunar months. And in an agreement to let by the month, without any expression further defining the term, it was held that lunar month was intended, even though the custom of the estate was to let by the calendar month, in the absence of proof that the custom of the estate was so generally known that it might be presumed that all persons in the district knew of it (*Rogers* v. *Hull Dock Co.*, 1864, 4 N. R. 494).

In a Will.—Where a clause in a will provided that the tenant for life should reside at the house for six months in every year, the word "months" was held to mean lunar months (*Walcott* v. *Botfield*, 1854, 2 Eq. Rep. 758).

Computation of a Calendar Month.—This will be dealt with more fully under TIME, *Computation of* (*q.v.*). It is only necessary to state here the general rule, that the day from or after which the time runs is excluded, and the day on which the act is to be done, or the protection afforded terminates, is to be included. The effect of this is to make the time run from a given day in one month to the day with the corresponding number in the next month, whatever may be the length of either, the latter day being included. Thus a month from notice given on the 28th April was held to expire on

the 28th of May (*Freeman* v. *Read*, 1863, 4 B. & S. 174). And where goods were sold on the 5th October, to be paid for in two months, it was held that no action could be brought until after the 5th December (*Webb* v. *Fairmanner*, 1838, 3 Mee. & W. 473). In the case of a term of imprisonment, however, the rule is different. The day on which the prisoner is sentenced counts as one day. The effect of this is to make the term of one month run from the day on which the sentence is passed to the day *preceding* that with the corresponding number in the following month, whatever may be the length of either. Thus a prisoner sentenced on the 28th February must be released on the 27th March. See *Migotti* v. *Colvill*, 1879, 4 C. P. D. 233, cited fully under TIME, *Computation of*.

Monthly Tenancies.—The incidents common to all tenancies have already been dealt with at length in the article on LANDLORD AND TENANT, and the present article is primarily concerned with those incidents which are peculiar to monthly tenancies. It will, however, be necessary to refer to the cases on quarterly and weekly tenancies, as the principles which govern any tenancy the duration of which is less than a year are to a great extent the same. Of course a tenancy can be expressly created for any period which the parties to the agreement choose to name: but where the lease is for an indefinite period, the question whether the hiring is quarterly, monthly, or weekly is often one of considerable importance. This question is usually one of fact for the jury (*Towne* v. *Campbell*, 1847, 3 C. B. 921), and the date at which the rent is payable and the length of notice requisite to terminate the agreement, are, as a rule, the best guides in interpreting an ambiguous agreement of this kind. If the rent is payable quarterly, the tenancy is probably one from quarter to quarter (*Wilkinson* v. *Hall*, 1837, 3 Bing. N. C. 508), and in the absence of any special stipulation to the contrary the tenant will hold not from the preceding or succeeding general quarter day, but from the time when he entered as tenant (*Kemp* v. *Derrett*, 1814, 3 Camp. 511; 14 R. R. 820), and would be entitled to a quarter's notice (per Coltman, J., in *Towne* v. *Campbell*, 1847, 3 C. B. 921). The general rule is that the fact of the demise being at a weekly or monthly rate raises a presumption of a weekly or monthly tenancy. On the other hand, neither the time at which the rent is payable nor the length of notice required to terminate the agreement are by any means conclusive, and the tenancy may still be a yearly one, though the rent is payable weekly (*Doe ex d. Peacock* v. *Raffan*, 1806, 6 Esp. 4), and the tenant may be entitled under the agreement to a month's notice (*ibid.*), or either the landlord or tenant may be at liberty to determine the tenancy at three months' notice from any quarter day (*R.* v. *The Inhabitants of Herstmonceaux*, 1827, 7 Barn. & Cress. 551). See also the statement of Lord Justice Cotton in the case of *In re Threlfall* (1880, 16 C. D. (C. A.) at p. 281), that he knew of no law or principle to prevent two persons agreeing that a yearly tenancy should be determined on whatever notice they liked. This passage is cited with approval by Lord Justice A. L. Smith in the recent case of *King* v. *Eversfield*, [1897] 2 Q. B. 475, where a piece of land was let at the rent of £19, 12s. a year, payable on the four usual quarter days for payment of rent in every year, and it was agreed that the tenancy might be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case might be, on any given day of the year. This tenancy was held to be a yearly tenancy for the purpose of obtaining compensation under the Market Gardeners

Compensation Act, 1895 (58 & 59 Vict. c. 27). In the absence of any special stipulation with regard to notice, it would appear from the case of *Doe ex d. Parry* v. *Hazell* (1794, 1 Esp. 93), where the plaintiff brought ejectment against the defendant, who had taken a house by the month, that a month's notice was sufficient to entitle the plaintiff to recover; and Mr. Justice Williams in the case of *Jones* v. *Mills* (1861, 10 C. B. N. S. at p. 798) says: "The inclination of my opinion is that where the holding is from week to week, a week's notice should be given, and a month's notice where the holding is from month to month." This has, however, been doubted in other cases, and Baron Parke in the case of *Huffel* v. *Armitstead* (1835, 7 Car. & P. at p. 58) said that he was not aware that it had ever been decided that in the case of an ordinary monthly or weekly tenancy a month's or a week's notice to quit must be given. See also *Sandford* v. *Clarke*, 1888, 21 Q. B. D. 398. The general rule may be modified by custom, but the onus of proving any custom lies on the party asserting its existence (*Caldecott* v. *Smythes*, 1837, 7 Car. & P. 808). The statement of Lord Denman, C.J., in *Simpson* v. *Margitson* (1847, 11 Q. B. at p. 31), that it is clear that months denote at law lunar months, unless there is admissible evidence of an intention in the parties using the word to denote calendar months, should be noted. A servant who occupies premises during the period of his service does not thereby become the tenant of his master, but as there is nothing incompatible in the relations of master and servant and landlord and tenant being combined in the same persons, care should be taken in engaging such a servant not to create a tenancy which may have the effect of making it impossible to get rid of the servant under a specified time and without an action of ejectment. By 7 & 8 Vict. c. 96, s. 67, "No landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any Court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment." The procedure in regard to execution is provided for by 8 Anne, c. 14; but if goods be taken in execution under a County Court warrant, this statute does not apply, and the procedure is regulated by sec. 160 of the County Courts Act, 1888. The Act 4 Geo. II. c. 28, which gives an action for double the yearly value for wilful holding over after notice in writing from the landlord by any tenant or tenants for any term of life, lives, or years is to be construed strictly, and has been held not to apply to a weekly tenant (*Lloyd* v. *Rosbee*, 1810, 2 Camp. 453); but sec. 18 of 11 Geo. II. c. 19, which is more general in its terms, and gives the landlord an action for double rent where the tenant has held over after himself giving notice to quit, appears to apply to all kinds of tenancies (Woodfall, *Landlord and Tenant*, 15th ed., p. 789). The case of *Sullivan* v. *Bishop* (1826, 2 Car. & P. 359) can clearly not be supported. The notice required by 11 Geo. II. c. 19, s. 18, need not be in writing (*Timmins* v. *Rowlinson*, 1765, 3 Burr. 1603).

By sec. 39 of 2 & 3 Vict. c. 71, magistrates are given power to deal summarily with cases of oppressive distress in the case of any house or lodging within the metropolitan police district let by the week or month. Sec. 1 of 32 & 33 Vict. c. 41 gives the occupier of any rateable hereditament, let to him for a term not exceeding three months, power to deduct the poor rate paid by him from his rents. The Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 211), provides that the owner of any premises liable to the general district rate which are let to weekly or monthly tenants

may, at the option of the urban authority, be rated instead of the occupier.

[*Authorities.*—Woodfall on *Landlord and Tenant*, 15th ed., 1893; Foà on *Landlord and Tenant*, 2nd ed.; Redman and Lyon on *Landlord and Tenant*, 4th ed.]

Month's Notice of Intention to Proceed.—By r. 13 of Order 64 of the Rules of the Supreme Court, 1883, it is provided as follows:—

> In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule.

The above rule is founded on, and is almost identical in terms with, r. 176 of the *Regulæ Generales* of Hilary Term, 1853.

Under the practice before the Common Law Procedure Acts, where no proceeding in a cause had been taken for more than four terms, a term's notice of intention to proceed was required.

The rule was thus stated by Lord Ellenborough in *May* v. *Wooding*, 1815, 3 M. & S. 500: "While the matter is still in controversy the party should, after so long a lapse of time as four terms without any proceeding, have notice that he may prepare himself; but when the matter has passed *in rem judicatam* by the verdict, the reason does not apply" (and see Tidd's *Practice*, p. 468). Accordingly, it was held that the rule related merely to interlocutory proceedings, and not to proceedings after verdict (*May* v. *Wooding, ubi supra*; *Newton* v. *Boodle*, 1847, 3 C. B. 795).

Under the old practice the rule was held to apply to the case of a rule to enter an issue (*Lord* v. *Hilliard*, 1829, 9 Barn. & Cress. 621); to notice of executing a writ of inquiry after interlocutory judgment (*Peyton* v. *Burdus*, 1739, 2 Str. 1100); to a motion to set aside a rule for a new trial (*Deacon* v. *Fuller*, 1833, 1 Dowl. 675); to the case of an application to discharge a rule for a new trial offered by the plaintiff, but not acted on for more than four terms (*Tipton* v. *Meeke*, 1824, 8 Moore, 579); to the signing of judgment for not proceeding to trial under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 101 (*Metcalf* v. *Hetherington*, 1858, 28 L. J. Ex. 155); and that in all such cases, where there had been no proceeding taken within the year, the prescribed notice must be given before the suit could be proceeded with. Under the new practice it has been held that if a plaintiff, on default of appearance by the defendant, takes no step for a year, the notice is necessary before judgment can be signed (*Webster* v. *Myer*, 1884, 14 Q. B. D. 231). And so where no step was taken for more than a year under an order for summary judgment under Order 14 (*Staffordshire Joint-Stock Bank* v. *Weaver*, 1884, W. N. 78). And so, in a foreclosure action, where more than a year had elapsed from the date of the chief clerk's certificate finding the amount due, the Court refused to make an order for foreclosure absolute without a month's notice to the defendant (*Blake* v. *Summersby*, 1887, W. N. 39).

The rule, however, did not under the old practice apply to a motion to set aside proceedings (*Lumley* v. *Hempson*, 1838, 6 Dowl. 558); nor to an application to sign judgment on a cognovit (*Thompson* v. *Langridge*, 1847, 1 Ex. Rep. 357); nor where an action was stayed by consent (*Watkins* v.

Haydon, 1770, 2 Black. W. 761), or at the request of the defendant (*Bland* v. *Darley*, 1790, 3 T. R. 530); nor where the delay was caused by an injunction (*Hayley* v. *Riley*, 1779, 1 Doug. 71; *Bosworth* v. *Phillips*, 1770, 2 Black. W. 784). Where a cause was stayed by an injunction, on the injunction being dissolved, it was held that the plaintiff could try without fresh notice of trial, although several terms had elapsed since notice of trial was given (*Stockton and Darlington Rwy. Co.* v. *Fox*, 1851, 6 Ex. Rep. 127). In *Munchiner* v. *Martin*, 1852, 12 C. B. 455, it was questioned whether notice was required where proceedings were suspended by an order for security for costs. The rule does not extend to the issue of execution, and therefore it is not necessary, in an action in which no proceeding has been had for one year, to give the month's notice prior to issue of execution (*Taylor* v. *Roe*, 1893, 68 L. T. 253, decided on the authority of *Houlston* v. *Woodward*, 1884, 78 L. T. Jo. 113, where the Court of Appeal held that a "proceeding" within the rule means a proceeding towards, not after, judgment).

Where plaintiff within the year gave notice that he should proceed, it was held that this was a proceeding rendering a term's notice unnecessary (*Richards* v. *Harris*, 1802, 3 East, 1; and see *Burlington* v. *Richardson*, 1853, 22 L. J. Q. B. 385). Obtaining an order to charge attorneys was not such a proceeding (*Deacon* v. *Fuller*, 1833, 1 Dowl. 675).

The provision in Order 64, r. 13, that notice of trial, although countermanded, is a proceeding which saves the necessity for the notice, is in accordance with the old practice (*Green* v. *Gauntlett*, 1722, 1 Stra. 530).

[*Authorities.—The Annual Practice*, 1898, p. 1093; Chitty's *Archbold's Practice*, 14th ed., 1885, pp. 1437, 1438; Chitty's *Forms*, 12th ed., 1883, p. 733; Tidd's *Practice*, 9th ed., 1828, p. 468.]

Monuments.—No monument can be erected in a church without the leave of the Ordinary (*Maidman* v. *Melpas*, 1794, 1 Hag. Con. 208), and it seems that one illegally or irregularly placed in a church cannot be lawfully removed without the like sanction (*Ritchings* v. *Cordingley*, 1868, L. R. 3 Ad. & Ec. 113). A monument once erected may be repaired without any fresh consent (*Bardin* v. *Calcott*, 1789, 1 Hag. Con. 16). Though the freehold of the churchyard is in the parson, yet the erector of a tombstone may maintain trespass against a person who wrongfully removes it (*Spooner* v. *Brewster*, 1825, 3 Bing. 136).

A gift or a trust for the perpetual repair of a tomb, not in a church, is bad, since such a purpose is not charitable and the trust or gift creates a perpetuity (*In re Tyler*, [1891] 3 Ch. 252).

The owner of any ancient monument to which the Ancient Monuments Protection Act, 1882, applies, viz. those mentioned in the Schedule to the Act and other monuments of a like character, may by deed constitute the Commissioners of Works the guardians of such monument; the Commissioners being invested with power to protect such monuments. Damaging such ancient monuments is made a punishable offence, so also is the damaging of any monument exposed to public view (Malicious Damage Act, 1861, s. 39). See ANCIENT MONUMENTS; TOMBSTONE.

Moorings.—See MARINE INSURANCE.

Moot.—See INNS OF COURT.

Moral Consideration.—See FRAUDULENT *Conveyances.*

Moral Insanity.—See LUNACY, vol. viii. at p. 53.

Moral Personality (*Personnalité morale*)—A term used in Continental law to describe the legal status of bodies of persons having corporate capacity.

More or Less.—See ABOUT; THEREABOUTS.

Morganatic Marriage.—See ROYAL MARRIAGE.

Mormonism.—See FOREIGN MARRIAGE; MARRIAGE.

Mortgage.

TABLE OF CONTENTS.

Preliminary 467
Definition of Mortgage . . . 468
Different Kinds of Mortgages . . 468
Forfeiture of Redemption by Clandestine Mortgage 469
What must be excluded from Mortgages 470
(1) Rule that Mortgage shall not be made Irredeemable 470
(2) No Clog on the Equity of Redemption 470
(3) No Collateral Advantages to the Mortgagee . . 470
Cases showing Mortgage may not be Irredeemable 470
Evasions of the 1st Rule . . . 472
By Mortgagees taking a Policy or Collateral Security without any Agreement 472
By an Absolute Sale with a Contemporaneous Option of Purchase or Hire and Purchase Agreement 473
Cases on Rules (2) and (3) . . 473
Bonus 474
Compound Interest 474
Commission 474
Leases to Mortgagee 475
Reservation of Higher Interest in Case of Default 476
Agreement for Mortgage . . . 476
Form of Mortgage and Statutory Powers 477
Power of Sale and appointing Receiver 480
Attornment 481
Mortgage for Term Certain . . 484
Consolidation 484
Leases by Mortgagor . . . 484
Mortgages of Copyholds . . . 485
„ Leaseholds . . . 487
General Rule as to all Mortgages of Land—Obtain Legal Estate and Deeds 490
Registration 491
Mortgages of Policies of Assurance . 491
„ Debts and Choses in Action . . . 495
„ Fixtures and Trade Machinery . . 498
Mortgages to secure further Advances 500
Sureties 500
Mortgages by Deposit . . . 501
Notices necessary to perfect Mortgages 501
Transfers of Mortgages . . . 504
Miscellaneous Cases (Wife joining in Mortgage with Husband; for Antecedent Debts; by Beneficiary Trustee; by Solicitor; to Brewers; Business Premises; Statutory Mortgage; Trust Mortgages; etc.) 506
Mortgages of Patents, see PATENTS.
Statutes of Limitation as Applicable to Mortgages 509

This article is intended to deal with the principal points that must be considered by the conveyancer in framing a mortgage, and the nature of the provisions that may be included and the form of mortgages, and the opera-

tion of the Statutes of Limitation with respect to mortgages, which appear not to be so fully treated in the standard treatises as other points are.

So far as regards the form of mortgages, and the practice of conveyancers in framing them, it is founded on the essay by the late Mr. Jacob Waley in the preface to the second part of the second volume of Davidson's *Precedents in Conveyancing*. The essay was written by him for an early edition, reprinted after Mr. Waley's death in the later edition published in 1881, with notes by the late Mr. Charles Davidson and Thomas Key, who, as well as Mr. Waley, were conveyancers to the Court of Chancery. Having regard to the repute of these conveyancers, it is considered that, so far as not altered by statute, the text of the essay is in conveyancing practice as good an authority as a decision of the Courts, and that as it was published in 1881, immediately before the passing of the Conveyancing Act of 1881, it will be a convenient way of explaining the effect of modern legislation on the form of mortgages by comparing the practice as explained by Mr. Waley with that now in use.

Owing to want of space, and the numerous alterations and additions that have been made by statute since 1881, it is impossible to reprint Mr. Waley's essay in full. This essay is in this article referred to as Dav. ii. 2; the notes of Mr. C. Davidson and Mr. T. Key as Dav. ii. 2 *n.*

Definition of Mortgage.—Mr. Waley, in his preface to Davidson, vol. ii. pt. 2, quotes the definition of mortgage in 4 Com. *Dig.* tit. "Mortgage": "When things moveable or immoveable, as goods or lands, are pledged as a security for repayment of money," and observes "that it may be a question whether this draws a sufficient distinction in the case of personal chattels between mortgaging and pawning it; and, to make the definition complete, it should show that the mortgage is to be made by a legal or equitable transfer of the things mortgaged, not depending wholly on actual delivery. The definition, too, should in strictness exclude a mere charge, as the case of a portion under a term in which there is no debt and no right of foreclosure."

The earliest form of mortgage was probably such as described in Littleton, A. D. s. 332: "If feoffment be made on such condition the feoffor pay to the feoffee on a certain day £40 money, then the feoffor may re-enter; if he do not pay, then the land which is put in pledge upon condition for the payment of money is taken away from him for ever, and is 'dead' to him upon condition." The old form of a conveyance, with a proviso or condition for making the conveyance void on payment of the mortgage debt and interest on a given day, was objectionable on account of the strictness with which conditions were construed, and because the money was seldom paid on the day appointed (Dav. vol. ii. pt. 2, pp. 31–72).

The form of a mortgage proper is an absolute conveyance to the mortgagee, subject to a proviso for reconveyance on payment on a day fixed. Courts of equity have from quite early times, at least from the 37 of Elizabeth (see *Langford* v. *Barnard*, Toth. p. 231) held that until foreclosure by a decree of the Court, or sale under any power conferred on the mortgagee, whatever the form of mortgage, the mortgagor had a right to redeem, though his estate might have been absolutely forfeited at law, in accordance with the deed. See this discussed, 2 *L. C. Eq.*, 7th ed., 1897, p. 15.

A mortgage in the form of a conveyance subject to redemption would give the right to the mortgagee after the day of payment had passed to apply to a Court of equity for a decree for foreclosure, *i.e.* determining the equitable right to redeem, and making the estate of the mortgagee absolute.

subject to certain equitable doctrines for opening the decree. See these discussed, *ante*, vol. v. tit. FORECLOSURE.

It is obvious that where there is a mere charge, and not an absolute conveyance, subject to a right of redemption, the right to foreclosure does not apply unless the charge amounts to an agreement for a formal mortgage (see as to this, *ante*, vol. v. p. 406, tit. FORECLOSURE). And this made Mr. Waley, in the passage quoted *ante*, say that the definition of a mortgage should exclude a mere charge.

The distinction between a formal mortgage and a mere charge is even in this respect of much less importance now than it was formerly, as by sec. 25 of the Conveyancing Act, 1881, repealing (see subs. 6) and extending s. 48 of the Act 15 & 16 Vict. c. 86, it is (by subsec. 2) provided that in any action, whether for foreclosure or redemption, or for sale, or for the raising or payment in any manner of mortgage money, the Court, on the request of the mortgagee, or any person interested either in the mortgage money or the right of redemption, . . . may direct a sale, etc.; "so that even in a formal mortgage, subject to redemption, a sale may be directed."

Modern legislation has made other alterations. By the C. A. 1881, s. 2, subs. 6, a mortgage, for the purpose of the Act, is defined as follows:— "Mortgage includes any charge on any property for securing money or money's worth." This has been held to include a charge on shares for a debt due to the company from a shareholder, under the common provision in the articles for a lien (see *Everitt* v. *Automatic Co.*, [1892] 3 Ch. 506). By subsec. 7, encumbrance includes a mortgage in fee or for a less estate, and a trust for securing money, and a lien and a charge of portion, annuity, or other capital or annual sum.

And the same Act (s. 19), where a mortgage is made by "deed," gives to the mortgagee various powers, including a power of sale, if anything wider in its terms than that in the old common forms (see s. 19, subs. 1, and the auxiliary provisions, ss. 21, 22; of insurance, s. 19, subs. 2, and s. 23; of appointing a receiver, s. 19, subs. 3, and s. 24; and cutting timber, s. 19, subs. 4).

In considering the different kinds of securities for money, a distinction must be made between the following:—

(1) A mortgage in the form of conveyance, subject to redemption, giving a right to foreclosure.

(2) A mere charge, or a mortgage by way of trust for sale, not giving a right to foreclosure.

(3) Between either a mortgage or a charge made by deed and one not made by deed, inasmuch as the powers conferred by the Conveyancing Acts attach only when made by deed.

(4) Between such agreements for security as "(*a*) give a right to a mere charge, (*b*) give a right to a formal mortgage, with its incidents of right to foreclosure." This latter class includes, according to modern authorities, the ordinary equitable mortgage by deposit of title-deeds (see tit. FORECLOSURE). There are also encumbrances which do not come within the scope of this article, *e.g.*—

(5) Bills of sale (as to which, see *ante*, vol. ii. pp. 126–147).

(6) Pawns or pledges (as to which, see *infra*, tit. PAWN).

(7) A lien, such as a vendor's lien.

(8) A trust or charge for securing money given by will, without the creation of a debt.

Clandestine Mortgages—Forfeiture of Right to Redemption.—Although the right of redemption is an incident to every security, whatever its form,

it may be forfeited. By the statute relating to clandestine mortgages (4 & 5 Will. & Mary, c. 16) it is in effect enacted that a person making a second mortgage, without discovery "in writing" of the first mortgage, shall lose the right of redemption against the mortgagees.

This statute is discussed in the old case of *Stafford* v. *Selby*, 1707, 2 Vern. 589, and in *Kennard* v. *Futvoye*, 1860, 2 Gif. 81, from which it appears that it will be construed strictly as not applicable to a mere charge, but only to a case where the mortgage is in the form of a conveyance, subject to redemption, and where the day fixed for redemption has passed. These cases were recognised by Kay, J., in *James* v. *Kerr*, 1889, 40 Ch. D. 459.

What Provisions must be excluded from a Mortgage.—Before discussing the form of mortgages, Mr. Waley (Dav. vol. ii. pt. 2, p. 7) compares with the modern practice the statement of the old law in Littleton (Litt. s. 32, A. D.), as applicable to a feoffment or condition, "for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him; and if he doth pay the money, then the pledge is dead as to the tenant."

But at least since the 37 of Elizabeth (see *Langford* v. *Barnard*, Toth. 231) it has been the rule in equity that a mortgage cannot by any stipulations between the parties at the time of making it be made irredeemable (see per Lord Eldon, *Seton* v. *Slade*, 1802, 7 Ves. 265–273, and 2 *L. C. Eq.*, ed. 1897, pp. 1 *et seq.*; see also *Howard* v. *Harris*, 1683, 1 Vern. 191; 2 *L. C. Eq.*, ed. 1897, p. 11).

And as branches or corollaries of the rule, it has long been laid down that the mortgagee shall not "clog the equity of redemption," or obtain a collateral advantage from his mortgage beyond the principal and interest.

So far as regards the principal rule that the mortgage cannot by stipulation at its date be made irredeemable, this has been emphatically confirmed by recent cases. Cotton, L.J., in giving judgment in the case of *Northampton* v. *Pollock*, 1890, 45 Ch. D. (see p. 210), affirmed, D. P. *nom. Salt* v. *Northampton* [1892] App. Cas. 13, says: "'This Court,' says Lord Hardwicke in *Toomes* v. *Conset*, 1745, 3 Atk. 261, 'will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever.'" Cotton, L.J., proceeds: "He gives some reasons for that which may or may not now be the only reasons, but that is the principle of the Courts of equity." Bowen, L.J., S. C. (see p. 215), says: "The principle invoked by the plaintiff is summed up in the epigrammatic formula 'once a mortgage always a mortgage.' Whenever a transaction is in reality one of mortgage, equity regards the mortgage property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem."

This was affirmed by the judgment of the House of Lords in the same case, *nom. Salt* v. *Northampton*, [1892] App. Cas. 13, in which the rule was recognised and affirmed; and Lord Bramwell refers to the corollary of it, that no stipulation shall be allowed which will clog the equity of redemption. In that case there was an express stipulation in the mortgage that in a certain event a policy taken out by the mortgagee was to be the absolute property of the mortgagee, and notwithstanding that the event had happened the mortgagor's representatives were entitled to redeem.

See also *In re Edwards*, 1861, 11 Ir. Ch. 367, where a contract in the mortgage to sell in certain cases at a fair price was held void; and for old

cases, *Howard* v. *Harris*, 1683, 1 Vern. 191; 2 *L. C. Eq.* 11; *Price* v. *Perry*, Free. Chy. 258; *Willett* v. *Winnell*, 1687, 1 Vern. 488; *Bowen* v. *Edwards*, 1862, 1 Ch. R. 222. In the case of *Tapley* v. *Sheather*, 1862, 11 W. R. 12; 8 Jur. N. S. 1163, cited Dav. ii. pt. 2, p. 5 *n.*, where Lord Westbury decreed performance of an agreement that if an unsecured loan was not repaid a farm and farming stock should be assigned at a valuation, it was held a conditional sale and not a mortgage (see Ashburner, p. 276).

It is to be observed that in the case of *Salt* v. *Northampton*, *supra*, part of the contract was that the mortgagor should be liable for the premiums on the policy to be taken out. The judgments indicate that the rule might be evaded in effect by a policy or some collateral security being obtained by the mortgagee apart from the agreement for mortgage.

Apparently he might bargain for interest at such a rate as would enable him, in fact, if he chose, to obtain such policy or further security, provided there was no contract that he should do so, and the mortgagor was not to be liable for the premiums or expense.

Of course in the case of a policy the mortgagor would often have to assist and have notice, as it would be necessary to present him for examination to the office, and this might raise the contention that it was part of the contract, and the scheme would not in any case be satisfactory. But the judges treat it as practicable. Thus in delivering judgment in the case of *Marquess of Northampton* v. *Pollock*, 1890, 45 Ch. D., Cotton, L.J., said: "Of course there are cases where there was no contract between the parties, and where the person lending the money, as I say, chooses himself to insure the borrower's life. There he does that simply for his own benefit, and he can whenever he likes drop the policy, and he can take it up when he likes; but he does it simply as his own property and for his own benefit."

So in delivering judgment in the House of Lords in the same case, *nom. Salt* v. *Marquess of Northampton* ([1892] App. Cas. 15), Lord Selborne said: "I am not prepared to hold that if it were made out that the policy was effected for the creditor's benefit, subject only to an option for the debtor to acquire a right to it by making a payment which he never made, the obligation of paying the premium, which the debtor certainly undertook, would have made it the property of the debtor, contrary to the contract. I see no principle on which I ought so to hold since the repeal of the usury laws, and in the absence of an allegation or proof of fraud, oppression, or other unfair dealing. There was originally, in the respondent's pleading, an allegation of some unfair dealing; but at the trial it was abandoned, and it now stands formally dismissed.

"But the authorities (*Holland* v. *Smith*, 6 Esp. 11; *Drysdale* v. *Piggott*, 1856, 8 De G., M. & G. 546; *Morland* v. *Isaac*, 1859, 20 Beav. 389; *Bruce* v. *Garden*, 1869, L. R. 5 Ch. 32) certainly establish that the *primâ facie* effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor; the principle being that what the debtor pays or agrees to pay for is (*primâ facie* at all events) his, subject to the security for the purpose of which it was brought into existence." See for cases where a policy has been held to belong to a mortgagee, *infra*, p. 493.

The only other difficulty in applying the principal rule, that a mortgage cannot be made irredeemable by any agreement at the date of the mortgage, is to distinguish what is a mortgage or security from a purchase with a

right of repurchase, or, in the case of chattels, a sale with a contemporaneous hire and purchase agreement.

The rule is frequently evaded by a sale with option of repurchase either of the whole interest or an annuity, payable out of it within a limited time. Such a sale, if *bonâ fide*, was allowed even while the laws against usury were in force. These sales are discussed in Ashburner, pp. 272–278, and White and Tudor, *L. C. Eq.* vol. ii. pp. 24–28. As to being allowed even while the usury laws were in force see *Floyer* v. *Lavington*, 1714, 1 P. Wms. 269; *Mellor* v. *Lees*, 1742, 2 Atk. 494; *Davis* v. *Thomas*, 1830, 1 Russ. & M. 506; *Joy* v. *Birch*, 1836, 10 Bli. N. S. 241.

See also the leading case of *Thornborough* v. *Baker*, 1677, 1 Ch. Cas. 283; 2 *L. C. Eq.* 1, where Lord Nottingham recognised the validity of the sale of property with option of repurchase as distinct from a mortgage.

It was said in *Longuet* v. *Scawen*, 1 Ves. 404, the Court always leans against contracts of this kind, and endeavours, if possible, to bring them to be cases of redemption. See for old cases showing what would be taken as indications that the transaction was to be treated as a mortgage and not a sale, *Lawley* v. *Hooper*, 1745, 3 Atk. 278; *Verner* v. *Winstanley*, 1805, 2 Sch. & Lef. 393; *Bulwer* v. *Astley*, 1843, 1 Ph. 422; *Kenny* v. *Lynch*, 1845, 2 Jo. & Lat. 330; and for modern cases, *Preston* v. *Neele*, 1879, 12 Ch. D. 767, and the judgment of Cave, J., in *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 1; S. C. on app. *ibid.* 638. See also *Douglas* v. *Culverwell*, 1862, 4 De G., F. & J. 20, which related to a transaction in 1841 before the repeal of the usury laws; and see *Barnhart* v. *Greenshields*, 1853, 9 Moo. P. C. 18; *Holmes* v. *Matthews*, 1855, *ibid.* 413.

The distinction between a mortgage and a sale with option of repurchase within a limited time has been recognised in many modern cases (see *Alderson* v. *White*, 1858, 2 De G. & J. p. 97, where Lord Cranworth says: "The rule of law on this subject is one dictated by common sense, that, *primâ facie*, an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments." This is quoted with approval by Lord Macnaghten in *M. S. & L. Rwy. Co.* v. *North*, 1888, 13 App. Cas. see p. 568, where Lord Macnaghten says, "In all these cases the question is what was the real intention of the parties").

See also per Lindley, L.J., in *Secretary of State for India* v. *British Empire, etc., Co.*, 1892, 67 L. T. 434.

For a good statement of the law before 1890, both as to sales with option of repurchase and sales of chattels with hire and purchase agreement, see the judgment of Cave, J., in *Beckett* v. *Tower Assets Co.* (*supra*), [1891] 1 Q. B. 1; on appeal *ibid.* 638. See also *In re Odell*, 1878, 10 Ch. D. 76; *M. S. & L. Rwy. Co.* v. *North Central Wagon Co.*, 1881, 19 Ch. D. 478; *Yorks Rwy. Wagon Co.* v. *Maclure*, 1882, 21 Ch. D. 318; *United Forty Pound Club* v. *Bexton*, [1891] 1 Q. B. 28 *n.*

As to allowing the mortgagor to adduce parol evidence to show that what purports to be a sale was a mortgage, see *Maxwell* v. *Montacute*, 1719, Prec. Ch. 526; *Holmes* v. *Matthews*, 1855, 9 Moo. P. C. 413; *Barnhart* v. *Greenshields*, 1853, *ibid.* 18; *Douglas* v. *Culverwell*, 1862, 3 Gif. 251; 4 De G., F. & J. 20; *Lincoln* v. *Wright*, 1859, 4 De G. & J. 16; *In re Duke of Marlborough*, [1894] 2 Ch. 135; *Barton* v. *Bank of N. S. W.*, 1890, 15

App. Cas. 379; and *Alderson* v. *White* (*supra*), 1858, 2 De G. & J. 97–107; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

The practice is frequently adopted in dealings with insurance or reversionary offices. The plan is carried out (1) by an absolute assignment as a sale, and (2) an agreement that at any time within a limited period the vendor may repurchase at a price fixed according to the time that may have elapsed and generally stated in a schedule.

As a rule, the offices require the agreement (giving the option of repurchase) to be by separate instrument, but for the security of the vendor, it or notice of it ought to be in the purchase deed. Probably the offices adopt the plan of two deeds in order to keep the instrument off the title in case of a future sale. But a question might be raised whether they were justified in not disclosing it, and any difficulty might be avoided by providing in the deed that no person taking title through the office after the expiration of the period allowed for repurchase should be affected by the agreement.

It appears (1) that the purchasers may reasonably require that the agreement for repurchase shall be separate, and that for their security there should in such case be an express provision that so far as regards any person taking title through the purchasers the agreement for repurchase must be treated as a personal agreement, not affecting the title but only giving a right of damages against the purchaser, in case of any dealings contrary to the agreement for repurchase.

(2) That the vendor can be advised to consent to such a plan where the purchasers are a large insurance office or reversionary office of repute, but that the agreement for repurchase should expressly state that it was part of the consideration of the original sale; unless this were stated or proved, it would seem to be a mere option, and, if so, not binding as a contract on the purchaser giving such option of repurchase (see *Dickinson* v. *Dodds*, 1876, 2 Ch. D. 463; *Bristol* v. *Maggs*, 1890, 44 Ch. D. 625; see also *Henthorn* v. *Fraser*, [1892] 2 Ch. 27).

As regards the corollaries to the principal rule, namely, (1) that there shall be no clog on the equity of redemption, and (2) that no collateral advantage beyond his principal and interest shall be made by the mortgagee, Mr. Waley, Dav. vol. ii. pt. 2, p. 45, in the edition of 1881, states as the "cardinal rule applicable to mortgages that the mortgagee must get nothing beyond his principal interest and costs" (see also *ibid.* pp. 9 and 91); but in modern cases the question has been raised whether this rule did not, to some extent at least, depend on the laws against usury; and therefore the question what must on this ground be excluded from a mortgage requires more consideration.

The application of old cases is complicated by the fact that they were decided during the existence of the laws against usury, and are partly grounded on those laws. By 12 Anne, st. 2, c. 16, until 17 & 18 Vict. c. 90 (taking effect on the 10th August 1850), interest above 5 per cent. was illegal, and until the 10th of January 1868, when the Sale of Reversions Act, 1867, came into force, undervalue was sufficient to set aside in any case a sale of a reversion.

The application of the old law is discussed by Kay, J., in *Maitland* v. *Upjohn*, 1889, 41 Ch. D. 126, and he mentions four cases in which equity would relieve. Kay, J., said: "I have now to deal with that which is the material part of this case, and it raises a question of very considerable interest and importance, namely, what sort of collateral advantage can a mortgagee stipulate for and take from his mortgagor, now that the usury

laws have been abolished by the Act of 1854. Before that time it was very well settled that collateral advantage could not be insisted upon by a mortgagee. There are many ways in which the equity to redeem was defended by stringent provisions laid down by the Court which created that equity. Among them there was first of all this: (1) that the amount stated in the mortgage deed to be advanced was never conclusive. The mortgagor, or anybody claiming under him, was always at liberty to show, if he could, that the amount had not been actually advanced. (2) Another was this: a stipulation capitalising interest, turning it into principal and charging interest upon it, however formally expressed, was not allowed to prevail. (3) A stipulation that the mortgagee if he entered should be paid a commission for receiving the rents was always defeated; and it is not now, according to the latest authorities, allowed to prevail; and (4) further, a stipulation that the interest should be paid at one rate, but that if not paid at that day, the rate would be increased, always was held to be void."

The authorities do not take any clear distinction between cases where the collateral advantage is wholly void from the commencement, and where it is only determinable with the redemption of the mortgage (see *Broad* v. *Selfe*, 1863, 11 W. R. 1036, *infra*). Thus in the case of a lease by the mortgagor to the mortgagee it may be that on redemption of the mortgage the lease would be surrendered, but treated as binding to the date of redemption.

Bonus.—As to (1), a mortgagor may still show that the amounts stated in the mortgage were not actually advanced, and when the laws against usurious interest were in force, the mortgagor would have been relieved against the excess. Since their repeal the mortgagee has been allowed to retain it.

Thus in *Mainland* v. *Upjohn* (*ubi supra*), Kay, J., allowed a bonus deducted on account of the nature of the security. So a bonus was allowed in *Potter* v. *Edwards*, 1857, 5 W. R. 407; 1857, 26 L. J. N. S. Ch. 468, which was approved of by Kay, J., in *Eyre* v. *Mackenzie*, [1894] 1 Ch. 218; and recognised by Cotton, L.J., in *Northampton* v. *Pollock*, 1890, 45 Ch. D. 212. In *General Credit & Co.* v. *Glegg*, 1883, 22 Ch. D. 549, a commission of 1 per cent. was allowed on instalments not paid to the date agreed upon. In *Bucknell* v. *Vickery*, 1891, 64 L. T. N. S. 701, the Privy Council treated as valid a provision in a mortgage deed for a commission of 2½ on any renewals of a promissory note, taken as a collateral security, but in the event it was held that there had been no renewal. See also *Wallingford* v. *Mutual Society*, 1880, 5 App. Cas. 685. And in the case of a mortgage of a ship, *In re The Benwell Tower*, 1895, 72 L. T. 664, see p. 669.

Compound Interest.—As to (2) compound interest. The old cases put the illegality of this on the usury laws (see *Chambers* v. *Goldwin*, 1804, 9 Ves. Jun. 271; *Blackburn* v. *Warwick*, 1836, 2 Y. & C. Ex. 99. See also *Moss* v. *Bainbrigge*, 1854, 6 De G., M. & G. 330). And since the Act of 1854, 17 & 18 Vict. c. 90, stipulations for compound interest are treated as valid (see Dav. ii. pt. 2, p. 361 *n.*), and in *Clarkson* v. *Henderson*, 1880, 14 Ch. D. 348, such a stipulation was held to be valid. So fines in mortgages to building societies have been affirmed (*Provident P. B. Society* v. *Greenhill*, 1878, 9 Ch. D. 122; *Parker* v. *Butcher*, 1867, 3 Eq. 762).

(3) A commission for receiving rents.

The third case put by Kay, J., in *Mainland* v. *Upjohn* (*supra*) directly involves the question whether the rule against a mortgagee obtaining collateral advantages depended on the usury laws, and has fallen with their repeal. It appears to be still in force.

This is so laid down by Lord Romilly in *Broad* v. *Selfe*, 1863, 11 W. R. 1036; 9 Jur. N. S. 885. And referring to this in *James* v. *Kerr*, 1888, 40 Ch. D. 449, Kay, J., said: "I believe with Lord Romilly that the rule that a mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest did not depend on the laws against usury."

In *Broad* v. *Selfe* (*supra*) Romilly, M. R., held an agreement with an auctioneer in consideration of an advance by him that he should sell the property and pay himself a commission was revocable, but that he was entitled to an account for services before the revocation. See also *Matthe-son* v. *Clarke*, 1854, 3 Drew. 3; 24 L. J. Ch. 202; *Arnold* v. *Garner*, 1847, 2 Ph. 231; *In re Benwell Tower*, 1895, 72 L. T. 664; *Barrett* v. *Hartley*, 1866, 2 Eq. 789.

The cases before the Mortgagees Legal Costs Act, 1895, 58 & 59 Vict. c. 25, decided that a solicitor mortgagee could not claim profit costs although there was an express power in his mortgage that he should do so to support the same view. Although in *Jones* v. *Linton*, 1881, 44 L. T. N. S. 601, Bacon, V.C., allowed such a provision, in *In re Roberts*, 1889, 43 Ch. D. 52, Kay, J., disallowed it, though on different grounds. This case was approved of by Lopes, L.J., in *In re Wallis*, 1890, 25 Q. B. D. 176; and in *Field* v. *Hopkins*, 1890, 44 Ch. D. 524, Kay, J., held that a provision in a mortgage to a solicitor that he should charge profit costs was void on the express ground that it was obnoxious to the rule against collateral advantages clogging the reversion. The decision of Kay, J., in *Field* v. *Hopkins* was approved of by Kekewich, J., in *Eyre* v. *Mackenzie*, [1894] 1 Ch. 218; affirmed by the Court of Appeal on a different point ([1896] 1 Ch. 135). Any question as to the right of the solicitor mortgagee to charge costs for strictly professional work is removed by the Mortgagees Legal Costs Act, 1895, which confers the right on the solicitor mortgagee to charge profit costs for professional work.

Leases by Mortgagor to Mortgagee.—There is some difficulty in applying the doctrine to leases to a mortgagee by a mortgagor. In principle they would seem to fall within the rule stated above by Cotton, L.J., in *Northampton* v. *Pollock*, because to the extent of the estate taken by a lease it would seem to be an absolute purchase not redeemable with redemption of the mortgage. On the other hand, where the lease is for a limited term, and the mortgage is for the same term, it might be argued that the objection would not apply on the ground that it made the estate irredeemable, but it would seem then that there was a "collateral advantage."

There have been several Irish cases on leases:—

In *Gubbins* v. *Creed*, 1804, 2 Sch. & Lef. 214, a lease after mortgage was set aside on the ground that advantage was taken of the distress of the mortgagor.

In *Webb* v. *Rorke*, 1806, 2 Sch. & Lef. 661, the lease was for 999 years, and after the mortgage was disallowed because of the position of the parties, though the value might be fair.

In *Drew* v. *Power*, 1803, 1 Sch. & Lef. 182, a lease at the time of the mortgage was held bad, both on the Statutes of Usury and because the mortgagor was not a free agent wanting a loan.

In *Hickes* v. *Cooke*, 1816, 4 Dow, 17, a grant of land subject to a fee-farm rent by a mortgagor to a mortgagee, after and while the mortgage was continuing, and stated by the plaintiff to be made to secure payment of interest, was not set aside, but only on the ground of lapse of time. Lord Eldon seems to have considered that the lease as alleged for the purpose

of securing payment of interest might be good, but Lord Redesdale held that but for lapse of time it must have been set aside.

In *Morony* v. *O'Dea*, 1809, 1 B. & B. 109, the Irish L. C. Manners refused to set aside a lease by mortgagor to mortgagee which seemed of fair value, and had been acquiesced in for nineteen years, though it was granted on the occasion of a further loan, and set aside a lease granted subsequently on a further loan which appeared to be at an undervalue. He seems to have treated the law as allowing a lease from a mortgagor to a mortgagee at a fair value, provided it was treated as a security, and relinquished on repayment of the money; but the case turned on the special circumstances.

In *Luker* v. *Dennis*, 1877, 7 Ch. D. 227, a covenant in a mortgage deed to take beer from the mortgagees, who were brewers, was apparently treated as valid, but the mortgagor held under a lease prior to the mortgage in which there was a covenant to take the beer from the mortgagees, and the question whether the covenant in the mortgage was valid or not is not referred to in the judgment, which turned on the duty of the brewers to supply good beer.

In *White* v. *City of London Brewery Co.*, 1888, 39 Ch. D. 559; 42 Ch. D. 237, the mortgagees, who were brewers, had entered into possession, and let the property to a tenant, subject to a covenant to take the mortgagee's beer. It was held that as they might have got a better rent if they had let without the covenant, they were bound to account for the difference between the rent which they might have obtained and what they actually got, but not for any profit which they made by sale of beer to the tenant. Mortgage of patent (*Steers* v. *Rogers*, [1893] App. Cas. 232).

As to the fourth case mentioned by Kay, J., in *Mainland* v. *Upjohn*, that a provision would be void, declaring that if any interest was not paid at the day fixed the rate should be increased, this appears to be still law, though it is generally put on the ground that the higher rate would be relieved against as a penalty (see Ashburner, p. 300, and *Wallingford* v. *Mutual, etc., Society*, 1880, 5 App. Cas. 685). But the rule is unimportant, as the settled practice is to evade it by reserving the interest at the higher rate, and inserting a proviso that a lower rate will be accepted if paid within a time fixed, which is valid (see Ashburner, p. 300, and 2 *L. C. Eq.* pp. 260 and 266; *Stanhope* v. *Manners*, 1863, 2 Eden, 197; *Staines* v. *Banks*, 9 Jur. N. S. 1049, reversed on appeal; see per Jessel, M. R., *Union Bank* v. *Ingram*, 1880, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 1881, 18 Ch. D. 449–463; *Bright* v. *Campbell*, 1889, 41 Ch. D. 388; *Powis* v. *Maynard*, 1747, 3 Atk. 519; *Thompson* v. *Hudson*, 1869, L. R. 4 H. L. 1–15; *Union Bank of London* v. *Ingram*, 1880, 16 Ch. D. 53).

The result appears to be that compound interest is allowed; a bonus or larger sum than that advanced may be allowed where the security is bad, provided the terms are reasonable; and where such a bonus is provided it should be recited and brought within one of the decided cases, that the professional costs of a solicitor mortgagee may be allowed under the recent Act, but that it would be prudent to advise against any other estate or interest being part of the mortgage contract; and that if there is a stipulation for this, the value of it should be estimated by an independent valuer, and the mortgagor should have the option of determining or redeeming it on redemption of the mortgage.

Agreements for Mortgage.—The commonest form of agreement for a mortgage is a deposit of title-deeds noticed *infra*, p. 501, which implies an agreement to give a formal mortgage.

Specific performance of an agreement to execute a mortgage, or give security when money has been advanced on it, would be enforced (*Hermann* v. *Hodges*, 1873, 16 Eq. 18; *Ashton* v. *Corrigan*, 1871, 13 Eq. 76; and as to inserting a covenant for payment, *Saunders* v. *Milsome*, 1866, 2 Eq. 573; Ashburner, pp. 161, 162; see *In re Fitzgerald*, 6 Ir. R. Jur. N. S. 180).

But if money has not been actually advanced on such agreement, specific performance will not be enforced of an agreement to borrow or lend on mortgage by either proposed borrower or lender (*Rogers* v. *Challis*, 1859, 27 Beav. 175; *Sichel* v. *Mosenthal*, 1862, 30 Beav. 371; Dav. vol. ii. pt. 2, p. 9 *n.*; *Larios* v. *Bonany y Gurcty*, 1873, L. R. 5 P. C. 346; *Western Waggon Co.* v. *West*, [1892] 1 Ch. 271; *South African Territories Co.* v. *Wallington*, [1897] 1 Q. B. 692, affirmed by House of Lords, see *Solicitors' Journal*, March 26, 1898; which cases also show that the measure of damages for breach of such agreement is not the sum agreed to be lent, as to give that would in effect be to give specific performance. See also *Duckworth* v. *Ewart*, 1863, 33 L. J. Ex. 24; 2 H. & C. 129).

It is convenient before investigating the title of property offered as an investment on mortgage to take an agreement that the proposed borrower will pay the expenses if the loan goes off for defect in title or value. See as to such an agreement, *In re Blakesly & Beswick*, 1863, 32 Beav. 379; *Sweetland* v. *Smith*, 1833, 1 C. & M. 585, where the mortgagee was not allowed to recover interest for his money lying idle.

As to the Form of Mortgages.—Mortgages are made by the same forms of assurances and are framed on the same general principles as conveyances on sale (Dav. ii. pt. 2, p. 9).

The general rules as to framing conveyances will be found given at length in the first volume of Dav. *Conveyancing*—a new edition of which, edited by Mr. Thomas Cooke Wright and Mr. J. K. Darley, was issued in 1885, and therefore subsequent to the Conveyancing Act of 1881. It will be sufficient here to say that all persons from whom anything is to pass or who are to enter into any engagement contained in the deed must execute the instrument in the manner prescribed by law, and that all persons who are to take an estate or benefit by the deed should be named as parties (Dav. i. pp. 29, 30).

As to Recitals.—The general rules are given in Dav. i. 1885 ed., pp. 36–52. They are generally divided into narrative recitals, which set forth the facts and instruments, showing the title and the relationship of the parties to the subject-matter; and introductory recitals, which explain the motive for the operative parts (Dav. i. 1885 ed., p. 36).

The tendency in modern times has been to shorten deeds by omitting or curtailing recitals, and a further impulse to this tendency has been given by sec. 53 of the Conveyancing Act, 1881, which provides that "a deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof."

It has been observed by learned writers (see Hood and Challis' *Conveyancing Acts*, 3rd ed., 1889) that this section seems to make no change in the law, and that a deed expressed to be supplemental to another would be an unsatisfactory root of title. But the practice is common to curtail recitals in a mortgage by expressing that it is supplemental to deeds which would otherwise have been recited (see Hood and Challis' *Conveyancing Acts*, ed. 1898, p. 135).

Prior to the C. A. 1881, the practice had become common in many

cases, particularly in mortgages, to substitute a schedule for recitals, exhibiting in a tabular form the state of title with the existing incumbrances, the amount secured to them respectively, the deeds creating and transferring to them, to the period and periods (see Dav. vol. i. pt. 1, 1885 ed., p. 48; and the volume on *Mortgages*, vol. ii. pt. 2, p. 339; where it is noticed that though, as a rule, schedules are not prepared by counsel, the schedules such as are now suggested to be substituted for recital require often great skill, care, and preparation, and where counsel prepares the draft he should also prepare the schedule of this kind at the same time).

After referring to recitals in the mortgage deed, Mr. Waley proceeds to the operative parts as follows:—

"The general arrangement of the operative parts of a mortgage deed adopted in these precedents is the following:—First in order, and forming the first witnessing part of the mortgage deed, is the covenant for payment of the principal debt and interest at a specified time, usually six calendar months from the date of the mortgage deed."

It is to be observed here that this covenant contains the receipt for the mortgage money, and through the alteration effected by sec. 61 of the Conveyancing Act, 1881, where the money is advanced by two or more persons as trustees holding on a joint account, the words should now be added "out of moneys belonging to them on a joint account."

The rule is specified in the notes to Dav. vol. ii. pt. 2, p. 51 *n.*, payment to one of two covenantees would bind both at law before the Judicature Acts (*Husband* v. *Davis*, 1851, 10 C. B. 645; 20 L. J. Rep. N. S. C. P. 118); but in equity where a mortgage is taken to two persons jointly it is treated as a tenancy in common so that the survivor cannot give a receipt alone in the absence of express stipulations without the concurrence of the personal representatives of the deceased (*Petty* v. *Styward*, 1632, 1 Ch. R. 31; 1 Abr. Ca. Eq. 290; *Rigden* v. *Vallier*, 1751, 2 Ves. 258; *In re Jackson, Smith* v. *Sibthorpe*, 1887, 34 Ch. D. 732; *Steeds* v. *Steeds*, 1889, 22 Q. B. D. p. 541; *Matson* v. *Dennis*, 1864, 10 Jur. N. S. 461; 12 W. R. 926).

The difficulty was, before the C. A. 1881, removed by a separate joint account clause making the receipts of the survivor sufficient. This, as noticed by Mr. Waley, was inserted in the latter part of the deed. By sec. 61 of C. A. 1881, the necessity for this is removed by inserting in the receipt in the first witnessing part the words "out of moneys belonging to them on a joint account."

After the covenant for payment of the mortgage debt will follow the assurance by conveyance, assignment, demise, or otherwise, according to the nature of the property forming the subject of the mortgage. The operative words by which the assurance is made will be the same as in an absolute conveyance, with the addition usually (though this is not essential) of a reference (repeated as many times as there may be distinct witnessing parts appropriated to the assurance of the property to be mortgaged) to the subsequent proviso for redemption.

So far Mr. Waley. It must be added here that in the words of conveyance must be inserted "as beneficial owner," which imply the ordinary covenants for title. This is a material abbreviation effected by the C. A. 1881.

When Mr. Waley wrote, full covenants for title were inserted at the end of the mortgage deed. Sec. 7, subsec. (*i*), of the C. A. 1881, enacts that the words "beneficial owner" shall imply the covenants stated in the section which are in effect the absolute covenants for title formerly in use,

including in the case of a mortgage of leaseholds (subsec. (*d*)), the covenants as to the validity of the lease, payment of rents, and observance of covenants up to date, and further covenant for payment in future of rent and observance of covenants by the mortgagor.

It has been observed by eminent writers (see Hood and Challis' *Conveyancing Acts*, 1898 ed., p. 41) that the language of the section was directed only to mortgages by assignment, but that it is conceived it would apply to mortgages by demise, and in practice it is treated as doing so (see Key and Elphinstone's *Prec.*, 1894 ed., vol. ii. p. 85).

Mr. Waley proceeds:—"Next comes the proviso for redemption, which in modern usage is not a proviso for redemption but for reconveyance, and in which the plan formerly in use of stipulating for the payment of half a year's interest on the principal at the end of the first half-year, and for payment of the entire principal and another half-year's interest at the end of the first year, is abandoned; the stipulation conformably to the frame of the covenant for payment of the mortgage debt being that the principal and interest shall be paid at a specified time, which is generally the end of the first half-year.

"In the case of policies of assurance, reversionary interests in personalty, and other choses in action which, in ordinary course, would be realised by the mortgagee, if falling in during the continuance of the security, the proviso for redemption is followed by a declaration of trust of the money received by the mortgagee in respect of the mortgaged property, and a power for him to give effectual discharges. Next comes the covenant for payment of interest in the event of the principal not being paid at the day appointed, which is immediately followed by the provision or group of provisions, if any, qualifying the contract between the parties in relation to the payment or receipt of the money, principal as well as interest, secured by the mortgage. Under this head will come, in those cases in which they are found, the ordinary provisions for reduction of interest on punctual payment, for continuance of the loan during a certain term, for payment of the loan by instalments, and for putting the mortgagees on the footing of joint-tenants as regards the receipt of the mortgage money.

"Next in order come, where the circumstances of the case are such as to require them, the covenants which have for their object the preservation and maintenance of the value of the mortgaged property, such as covenants to insure against fire and to repair in mortgages in which buildings form an important portion of the security, covenants for keeping on foot or replacing life policies, or, in the case of renewable leaseholds or copyholds, for procuring renewals or regrants and subjecting them to the security."

Mr. Waley proceeds to state that the provisions of the order last alluded to are in the common form in use before the C. A. 1881, followed by the power of sale, which, according to modern practice, formed, with rare exceptions, part of every mortgage deed. And that after the power of sale would come in the form then common, where required by circumstances, an attornment clause or power of distress, appropriate to the case of any material portion of the property being in hand, and receivership clauses where the appointment of a receiver formed part of the security and was included in the mortgage deed—the class of provisions, in short, which conferred on the mortgagee additional powers and remedies; and that last of all come the covenants for title absolute, amounting to a warranty against and for the acts and omissions of the whole world. The proviso for quiet enjoyment by the mortgagor until default in payment of the

mortgage money, which formerly made part of every mortgage deed, was not inserted in Mr. Davidson's *Precedents*.

Of the three provisions mentioned in the last paragraph, the powers of sale and of appointment of receivers have been rendered unnecessary by modern legislation, and the attornment clause has fallen into disuse, because so far as giving a right of distress of personal chattels it is void under the Bills of Sale Acts, at least if unregistered, and because it has been held to put a mortgagee in the position of a mortgagee in possession as regards subsequent mortgages.

As regards the power of sale and appointing a receiver, sec. 19 of the C. A. 1881 enacts that the mortgagee, where the mortgage is made by deed, shall have the powers thereinafter stated to the like extent as if they had been conferred by the mortgage deed. These powers extend to the power of sale, of insurance, of appointing a receiver, which are very wide, and are generally made use of in the place of express powers. Powers for the like purposes had been conferred by Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145), which is repealed by sec. 75 of the C. A. 1881. But the powers of the C. A. 1881 are more extensive and convenient than those of Lord Cranworth's Act, except in one particular. Sec. 15 of Lord Cranworth's Act gives power to mortgagees on sale to convey the mortgaged property for all the estate or interest therein which the mortgagor had power to dispose of under his power. It has been held that an equitable mortgagee might convey the legal estate (*In re Solomon and Meagher's Contract*, 1889, 40 Ch. D. 508; see also *Hillman* v. *Hiatt*, 1871, 19 W. R. 694, deciding that a mortgagee by underlease might sell the whole lease vested in the mortgagor). This provision is omitted in the C. A. 1881, and it was held by North, J., and the Court of Appeal in the case of *In re Hodgson and Howe's Contract* (1887, 35 Ch. D. 669), that an equitable mortgagee selling in exercise of a power conferred by the C. A. 1881 cannot convey the legal estate vested in the mortgagor.

The powers given by Lord Cranworth's Act did not become exercisable till after the expiration of a year from the date when the principal money became due and payable according to the terms of the deed, or interest on the principal was in arrear for six months, or omission to pay payments which according to the deed ought to be paid. And it further provided (s. 13) that no such sale should be made until after six months' notice in writing, given to the person or one of the persons entitled to the charge or affixed in some conspicuous part of the property. And by sec. 17 of the Act a mortgagee was bound to require the mortgagor to appoint the receiver. Under the C. A. of 1881 a receiver is to be appointed at his discretion by the mortgagee, and the right to appoint is exercisable when the power of sale has arisen, and the restrictions on the exercise of the power of sale in the C. A. 1881 are that it shall not be exercised unless notice be given requiring payment, and default for three months after such notice, or interest be in arrear for two months, or there be some breach of provisions in the mortgage deed other than the covenant for payment of the mortgage money or interest. It is obvious, therefore, that the powers in the C. A. 1881 are much more beneficial to the mortgagee than those of Lord Cranworth's Act. The practice is almost universal of relying on the powers of the C. A., and not inserting special powers either of sale, appointing a receiver, or insurance.

It is to be observed also that Lord Cranworth's Act only extended to mortgages of hereditaments of any tenure, and the C. A. 1881 confers the powers on mortgagees by deed of any property.

Although the mortgagee cannot under the C. A. 1881 (if he has only an equitable interest) convey the legal estate (*Hodgson and Howe's Contract*, 1887, 35 Ch. D. *supra*) if his mortgage is by deed, he would have the powers conferred by the Act; and in *Blaker* v. *Herts Waterworks Co.*, 1889, 41 Ch. D. 406, Kay, J., while he held that a debenture of the waterworks company though under seal did not confer the power of sale in sec. 19 of the C. A. 1881, stated that it was clear that it applied to an equitable mortgage (see also *Hiatt* v. *Hillman*, 1871, 19 W. R. 694, *supra*).

In *London and County Bank* v. *Goddard*, [1897] 1 Ch. 642, a contrivance was successful which enabled a mortgagee under an equitable mortgage to obtain the legal estate without any further conveyance from the mortgagor. There S. G. had sold and conveyed to B., who mortgaged the fee to B. and K.; S. G. subsequently took a conveyance of the equity of redemption on the 26th August 1887, subject to the mortgage to B. and K. He deposited this deed by way of equitable mortgage with G. B. on 20th February 1894. S. G. subsequently paid off the whole mortgage to B. and K., took a reconveyance, and obtained all the earlier title-deeds, including therein the covenants to himself of 20th July 1882. He then made the mortgage in which the contrivance was successful, that is in February 1894. He deposited the deeds with the bank by way of equitable mortgage, and by deed poll accompanying the deposit charged all his estate and interest therein. The deed poll contained a declaration that he would hold his estate and interest in trust for the mortgagees and authorised them or their manager to remove him—the mortgagor—from the trust, appoint another person to be trustee in his place, and to make a declaration vesting all the mortgagor's estate and interest in the new trustee; and he gave the manager a power of attorney to execute any conveyance. The bank by indenture of 22nd March 1896 exercised their power of removing S. G. from the trusteeship, and appointed a new trustee, and declared that the land should vest in him. North, J., held that under the 12th section of the Trustee Act, 1893, the declaration operated to vest in new trustees all the estate and interest, subject to the trust, and consequently the legal estate; and that sec. 50 (the interpretation clause) of the Trustee Act, 1893, enacting that the expression "trust" does not include the duties incident to an estate conveyed by way of mortgage, did not apply to the case.

As to an Attornment Clause.—As to this Mr. Waley (Dav. vol. ii. pt. 2, p. 98) observes: "The utility both of an attornment clause and a power of distress in a mortgage, is seriously diminished by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). By the fourth clause of the Act, 'bill of sale' is defined so as to include any 'authorities or licences to take possession of personal chattels as security for any debt'; and by the sixth clause, 'every attornment instrument or agreement not being a mining lease, whereby a power of distress is given, or agreed to be given, by way of security, for any present, future, or contingent debt or advance; and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only is to be deemed to be a bill of sale within the meaning of the Act of any personal chattels which may be taken or seized, or taken under such power of distress.' Consequently an attornment clause or power of distress will, in default of the registration of the mortgage as a bill of sale (which would in general be objected to by the mortgagor), be invalid against creditors in the cases mentioned in clause 8 of the Act."

In addition to this, it should be noticed that sec. 6 of the Bills of Sale Act, 1878, after enacting that an attornment clause should operate to make

a deed containing in it a bill of sale, contained a proviso that this should not extend to any mortgage of an estate or interest in land which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant, at a fair and reasonable rent. In *Hall* v. *Comfort* (1881, 18 Q. B. D. 11) the Court of Common Pleas held that the ordinary attornment clause was saved by the proviso, and did not make a mortgage deed a bill of sale; but it has since been held that such a clause was not within the proviso at the end of sec. 8 of the Act of 1878, and was void for want of registration so far as regards the right to distrain chattels (*In re Willis*, 1888, 21 Q. B. D. 384; *Green* v. *Marsh*, [1892] 2 Q. B. 330; *Mumford* v. *Collier*, 1890, 25 Q. B. D. 279); and that in order to obtain the benefit of the proviso, the mortgagee must have entered into possession and demised to the mortgagor.

It must also be observed that since Mr. Waley wrote the article in Dav. vol. ii. pt. 2, in 1881, the Bills of Sale Act of 1882 has been passed, which by clause 9 enacted "a bill of sale made or given by way of security for money by the granter thereof shall be void, unless made in accordance with the form in the schedule to the Act annexed."

This raised the question whether an attornment clause or express power of distress in a mortgage deed did not make it necessary not only that it should be registered under the Act of 1878, but also that it should be in the form in the schedule to the Act of 1882. If this had been necessary, it would practically have prevented the creation of such a power in any mortgage.

In *re Burdett, Ex parte Byrne*, 1888, 20 Q. B. D. 310, chattels were assigned, and also a gas engine, a fixture. It was held that the assignment of the fixture might be severed from the assignment of the chattels; and the deed, though not in the scheduled form, and void as to the moveable chattels, was good as to the fixtures. *Davies* v. *Rees*, 1886, 17 Q. B. D. 408, was distinguished and explained.

In *re Willis, Ex parte Kennedy*, 1888, 21 Q. B. D. 384, no reference was made to the effect of clause 9 of the Act of 1882, but it was held that the proviso in sec. 6 of the Act of 1878 could not apply to a demise in the mortgage itself by the attornment clause; that to obtain the benefit the mortgagee must have actually entered into possession and demised.

In *Mumford* v. *Collier*, 1890, 25 Q. B. D. 279, it was held by the Queen's Bench Division that an attornment clause with the usual provision for entry by the mortgagee, though void as regards goods seized under it, or the right to distrain, was valid so far as creating the relation of landlord and tenant, and the mortgagee was entitled to judgment for recovery of the land under the express power in it. The Lord Chief Justice, in giving judgment (see p. 289), seems to have treated sec. 9 of the Act of 1882 as applying, but nothing turns on this in the judgment (see also as to the tenancy, *Kemp* v. *Lister*, *infra*).

In *Green* v. *Marsh*, [1892] 2 Q. B. 335, the Court of Appeal in a considered judgment, delivered by Kay, L.J., distinctly laid down that sec. 9 of the Bills of Sale Act of 1882 did not apply to an attornment clause. It does not appear that this was necessary for the actual judgment, but the words are clear.

"By sec. 9 of the Act of 1882 it would be void, because it is not according to the scheduled form if it is a bill of sale. But it is only to 'be deemed to be a bill of sale' of the chattels that might be distrained under it, according to sec. 6 of the Act of 1878. That must mean that it is not a bill of sale, but it is to be treated as one for the purpose of registration. If unregistered,

it would be void as to the chattels comprised in it under sec. 8 of the Act of 1882. But not being actually a bill of sale, it need not be according to the scheduled form, because sec. 9 does not apply to it."

According to that case, it appears that an attornment clause inserted in a mortgage of land when the mortgagor is in possession would be valid so as to give a power of distress if registered under the Act of 1878, though not in the form of the schedule to the Act of 1882.

It appears from the other cases cited *supra*, that even if the attornment clause was invalid so far as regards the power of distress over chattels, it still would not, under sec. 9 of the Act of 1882, invalidate the mortgage as to other property comprised in it (see also *In re Yates*, 1888, 38 Ch. D. 113; *Small* v. *National Bank*, [1894] 1 Ch. 686; *In re Brooke*, [1894] 2 Ch. 600), and that it would create a tenancy; and it has been decided by the Court of Appeal that an attornment clause in the ordinary form would enable possession of the land to be recovered by the summary process on writ specially indorsed under Order 3, r. 6, and Order 14, r. 1 (*Kemp* v. *Lister*, [1896] 2 Q. B. 162). A good form of attornment clause is given in Key and Elphinstone, ed. 1897, pp. 50, 51.

There is, however, a further point to be considered by the practitioner before an attornment clause is inserted.

Apart from the difficulties arising under the Bills of Sale Act, it has been considered that the attornment clause is undesirable, because of the dicta that the effect of such a clause would be to put the mortgagee in the position of mortgagee in possession as regards accounting to puisne mortgagees. There has been no express decision to this effect, but the following dicta of eminent judges:—

In *re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 356, Lord Justice James said that the effect of the attornment clause was to put the mortgagees in the position of mortgagees in possession, and therefore to make them liable for wilful default; and Bramwell, L.J. (*ibid.* 10 Ch. D. 357), adopted the same view. These dicta were cited by counsel *arguendo* in *Ex parte Harrison, In re Belts*, 1881, 18 Ch. D. 135, and on this Lord Selborne, L.C., observed: "That is to say, as between himself and a subsequent mortgagee, the mortgagee would be treated as in possession of the property. You could not say he was in that position as regards the mortgagor."

In *Ex parte Punnett, In re Kitchin*, 1880, 16 Ch. D. 235, Sir G. Jessel says: "As was pointed out in that case (*In re Stockton Iron Furnace Co., supra*) by James, L.J., and Bramwell, L.J., the mortgagee becomes mortgagee in possession, and liable to account as such." In *Green* v. *Marsh*, [1892] 2 Q. B. 335, Kay, L.J., in delivering the judgment of the Court of Appeal, says: "The attornment clause was not such a taking possession by the mortgagee as was contemplated by the proviso, though no doubt it would render him liable to account at the suit of a subsequent mortgagee for all the rent agreed to be paid by the mortgagor which might be unreceived owing to the mortgagee's wilful default."

Against these dicta there is an express decision of Bacon, V.C., in *Stanley* v. *Grundy*, 1883, 22 Ch. D. 478, that the attornment clause does not make a mortgagee mortgagee in possession as against subsequent incumbrances. And if Lord Selborne's view above cited be correct, that it does not make him mortgagee in possession as against the mortgagor, it seems anomalous that it should do so against a subsequent mortgagee, who can only take subject to the contract of the mortgagee with the first mortgagee.

If the attornment clause be inserted, it would be prudent to add a proviso, as in *Ex parte Willis*, 1888, 21 Q. B. D. 384, that the mortgagee should not be

accountable to a subsequent incumbrancer for any rent that the mortgagee might have received, and did not receive, under such attornment clause; or as in Key and Elphinstone's *Prec.*, ed. 1897, vol. ii. p. 50, that the tenancy created should not render the mortgagee liable to account as mortgagee in possession.

If the mortgagor should consent to the registration of the mortgage under the Bills of Sale Act, 1878, and an attornment clause should be inserted, the rent should be limited in amount to what would be a reasonable rent of the property. In *Ex parte Williams*, 1878, 7 Ch. D. 138, there was an attornment at a rent of £20,000, much more than the letting value; it was held that the arrangement was a mere device to give the mortgagee additional security in the event of the mortgagor's bankruptcy, and was therefore in that event void, as a fraud on the bankruptcy laws (see also *Ex parte Voisey*, 1882, 21 Ch. D. 442; *Ex parte Harrison*, 18 Ch. D. 125).

The attornment clause should, as recommended, Dav. 2 pt. ii. pp 94, 95, also reserve a right of entry to the mortgagee at any time without notice to the mortgagor, and should be at a tenancy from year to year, not at will, as in the latter case it would be defeasible by the alienation or death of the mortgagor (*Turner* v. *Barnes*, 1862, 2 B. & S. 435; *Pinhorn* v. *Souster*, 1853, 8 Ex. Rep. 763). As to the difference in effect between an attornment clause and a power of distress, see *Pinhorn* v. *Souster*, *supra*, and *Jolly* v. *Arbuthnot*, 1859, 5 Jur. N. S. 80, or at 4 De G. & J. 224.

As showing that the mortgagee must give notice before distraining, see *Clowes* v. *Hughes*, 1870, L. R. 5 Ex. 160; and that the right of distress as to arrears is lost by a transfer of the mortgage, *Brown* v. *Metropolitan Assurance Society*, 1848, 1 El. & El. 832; or by death of the mortgagor, *Scobie* v. *Collins*, [1895] 1 Q. B. 375.

Mortgage for Term Certain.—Notwithstanding the rules given *ante*, prohibiting any clog on the right of redemption, a provision that a mortgage shall be continued for a term certain, if the period be reasonable, is allowed (*Lawless* v. *Mansfield*, 1841, 1 Dr. & War. 602; *In re Hone*, 1873, Ir. R. 8 Eq. 65. See *Braddill* v. *Talbot*, 1683, 1 Vern. 183, 394, thirty years not allowed; *Cowdry* v. *Day*, 1859, 1 Giff. 316, twenty years not allowed). In *Teevan* v. *Smith*, 1882, 20 Ch. D. 724, Jessel, M. R., refers to the words in sec. 15 in the C. A. 1881, "where a mortgagor is entitled to redeem," and explained that these words "really include every mortgagor except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem' are inserted." They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation.

Consolidation.—Sec. 17 of the C. A. 1881 restricts a mortgagee from the right of consolidation of two mortgages on separate properties, unless a contrary intention is expressed in one of the deeds. If, therefore, it is intended to preserve the right, there must be an express provision in the mortgage deed excluding the application of sec. 17. As to the doctrine of consolidation, see *ante*, vol. iii. pp. 282–289.

Leases by Mortgagor.—Sec. 18 of the C. A. 1881 gives power of leasing to a mortgagor while in possession; and if it is not intended that he should have such power, it must be excluded by express provision in the mortgage deed.

The same section, subsec. 2, confers powers of leasing on a mortgagee in possession.

Mortgages of Copyholds.—The form of these mortgages remains the same as in 1881, except that the covenant accompanying the surrender is slightly altered. Mr. Waley's description is still accurate (Dav. ii. pt. 2, p. 112): "Mortgages of copyholds are made by surrender, conditioned to be void on payment of the mortgage debt and interest at the time and in manner specified, so that on payment of the money according to the condition, the surrenderor remains seised of his old estate (*Simonds* v. *Lawnd*, Cro. Eliz. 239). The condition exactly corresponds to the ordinary proviso for reconveyance of freeholds. The surrender is accompanied by a deed which contains the usual covenants for payment of the mortgage debt and interest, and for title. This was sometimes accomplished in former times by a bond; but in modern practice a deed of covenants is preferred, which usually precedes and bears the *ad valorem* stamp.

"The money ought not to be advanced till the surrender is actually made, for, whether for a first or subsequent mortgagee, there is no safety unless an actual surrender be made, so as to put the mortgage on the Court Rolls. Even in the case of a first mortgage, if before the surrender a second mortgagee, without notice of the covenant, should take a surrender to himself and be admitted, he would obtain priority, for he would have an equal equity with the first mortgagee, and would have the legal estate (*Oxwich* v. *Plumer*, 1708, Bac. *Abr.* tit. 'Mortgage,' 7th ed., vol. v. p. 664)."

"To the second mortgagee the surrender serves as a notice of his mortgage on the Court Rolls, and so prevents a subsequent incumbrancer from acquiring the advantages of the legal estate without notice."

So far Mr. Waley. It may be observed here that the deed of covenant to surrender, or covenant accompanying the surrender, according to the former practice contained full powers of sale, and ancillary provisions and covenants for title. See for a form, Dav. vol. ii. pt. 2, p. 405. By the C. A. 1881 these are conferred by implication, as in the case of a freehold mortgage (see *ante*, p. 480). Thus covenants for title are implied when the covenant to surrender is expressed to be "as beneficial owner," as "conveyance," according to sec. 2, subsec. v., includes a covenant to surrender. The power of sale is supplied where at least there is an express charge in the deed of covenant. It has been doubted whether a mere covenant to surrender would import the statutory powers (see Wolst. and Brinton's *Conveyancing Acts*, ed. 1885, p. 67; ed. 1891, p. 68; Fisher on *Mortgages*, ed. 1897, p. 152; Byth. and Jar. *Conveyancing*, 4th ed., vol. iii. p. 677); and the safest course is to add an express charge or a declaration of right to exercise the statutory powers. The surrender not being by deed, would not confer the powers.

An express declaration is added that the mortgagor, until surrender, holds the property in trust for the mortgagee (see Dav. ii. pt. 2, p. 405), in order that the mortgagee may obtain a vesting order or a vesting declaration under the Trustee Act, 1893 (see *ante*, p. 481), although it has been held that without any express declaration the covenant to surrender, with receipt of the mortgage money, would make the mortgagor a trustee (*In re Crowe's*, 1872, L. R. 13 Eq. 26).

"It is not usual for a mortgagee to be admitted, not only because a considerable expense for fines and fees would be incident to his admission, but because an actual surrender to and readmission of the mortgagor, with fresh fines and fees, would be necessary on paying off the mortgage; and if the mortgagee be actually admitted, he becomes liable to the payment of rents and heriots and to the performance of the services, which is

frequently undesirable. Till the admittance of the mortgagee, the mortgagor remains tenant to the lord (*Doe* v. *Wroot*, 1804, 5 East, 132; *Kenebel* v. *Scrafton*, 1802, 8 Ves. 30); and as well for the purposes of forfeiture and escheat as for other purposes (*R.* v. *Mildmay*, 1833, 5 Barn. & Adol. 254; Dav. vol. ii. pt. 2, p. 114).

"Where the mortgagee was admitted upon a conditional surrender, the lord, taking by escheat, was bound by the condition, and could not refuse to readmit the mortgagor upon payment of the debt to the personal representative of the mortgagee (*Weaver* v. *Maule*, 1830, 2 Russ. & M. 97); but in a case in which the surrender, though made for securing a sum of money, was in terms absolute, and the surrenderee (who was illegitimate) was admitted, and died intestate, the title of the lord by escheat was held to be unaffected by the trusts upon which the property was vested in the tenant (*A.-G.* v. *The Duke of Leeds*, 1833, 2 Myl. & K. 343). The lord's rights in the case of forfeiture and escheat were qualified by the statute 4 & 5 Will. IV. c. 23 (for the amendment of the law relative to escheat and forfeiture), which was repealed, but re-enacted in substance by the Act of 13 & 14 Vict. c. 60 (the Trustee Act, 1850); so that there is now little or no risk of either mortgagor or mortgagee being prejudiced by the escheat or forfeiture of the other's tenancy" (Dav. vol. ii. pt. 2, p. 115).

When Mr. Waley wrote, neither an equity of redemption nor any other equitable estate escheated to the Crown. But under the Intestates Estates Act, 1884 (53 & 54 Vict. c. 29), a mortgagor's equity of redemption escheats to the Crown as if it were a legal estate; but this does not seem to affect the remarks on the text.

"The lord cannot compel the mortgagee to be admitted, for it is sufficient that there is a tenant on the rolls (the surrenderor) to perform the services (*King* v. *Dilliston*, 1795, 1 Salk. 386). In *Tredway* v. *Fotherley*, 1699, 2 Vern. 367, where the Court of Chancery refused to relieve against the lord of a manor requiring a conditional surrenderee to come in and be admitted, the lord's claim was plainly illegal; but it does not appear that a Court of equity had any jurisdiction to interpose. See as to the nature of the interest of a surrenderor before the admittance of the surrenderee, *Minton* v. *Kirwood*, 1866, L. R. 1 Eq. 449; 1868, L. R. 3 Ch. 614."

"A surrenderee cannot maintain an action of ejectment till after he has been admitted. But as it is held that the admittance, when made, relates back to the surrender, the demise (in the old form of the action of ejectment) could be laid at any time in the interval between the surrender and admittance (*Holdfast* v. *Clapham*, 1787, 1 T. R. 600; 1 R. R. 309). And the surrenderee, when admitted, may recover the mesne profits from the date of the surrender (2 Wils. 15). A mortgagee may file a bill for foreclosure before admittance (*Sutton* v. *Stone*, 1740, 2 Atk. 101)."

"With a view to saving the expense of a double admittance in case of the exercise by the mortgagee of his power of sale, a practice was originated of framing conditional surrenders of copyholds to such uses as the mortgagee should appoint, and, in default of appointment, to the use of him and his heirs; so that when he sold, the purchaser, as his appointee, might become entitled to admittance upon the conditional surrender."

"The question, however, was raised whether, in the absence of special custom, the lord of the manor is bound to receive and enrol a surrender of this description (the tendency of which to interfere with the fruits of tenure is obvious), and it was decided in the negative (*Flack* v. *Downing College*, 1863, 13 C. B. 945). If the lord accepts the surrender, he cannot afterwards refuse to act on it (*Eddleston* v. *Collins*, 1853, 3 De G., M. & G. 1;

and see per Jervis, C.J., in *Flack* v. *Downing College*, *ubi supra*). If one surrendered to the use of his will, he created a power to name the tenant, and this is a power which may be delegated, as where a testator names somebody who is to appoint, and, in default of appointment, is to have the property; but this is a right peculiar to wills, and does not apply to transactions *inter vivos* (per Jervis, C.J., in *Flack* v. *Downing College*, *ubi supra*; and see *Glass* v. *Richardson*, 1852, 9 Hare, 698; 2 De G., M. & G. 658)."

"If a mortgagee of copyholds has not been admitted, and the mortgage is paid off, it is the practice to enter an acknowledgment of satisfaction on the Court Rolls, which is treated as sufficient evidence of the discharge of the mortgage, and as vacating the surrender. It is proper, also, that a receipt for the money should be indorsed on the deed of covenant accompanying the additional surrender."

"It is not usual in mortgages of copyholds to provide by special covenant for the payment by the mortgagee of the fines, costs, and expenses attendant on admittance, and other incidents of copyhold property. The matter is left to the general rule of equity; and undoubtedly the mortgagor would not be permitted to redeem until after repayment to the mortgagee, with interest, of any such sums as he might have been compelled to expend. The case differs considerably from that of leaseholds, where renewal is optional; but still it might be desirable to arm the mortgagee with a covenant for payment of the sums he might be compelled, or might find it desirable, to expend by reason of copyhold tenure. If the copyholds be held for lives, the mortgage should contain the usual provisions for renewal and payment of fines" (Dav. ii. pt. 2, p. 117). Before completing a mortgage of copyholds, the steward's copies of Court Rolls should be required, as the title-deeds on equitable mortgage might have been made by deposit of them (*Whitbread* v. *Jordan*, 1835, 1 Y. & C. Ex. 303).

Mortgages of Leaseholds. — The description of the ordinary form of mortgage given by Mr. Waley is still correct. He says:—

"In mortgaging leaseholds the form of the mortgage will be, in some degree, determined by the amount of the rent and nature of the covenants to which they are subject. An assignee of a lease is liable to the payment of the rent reserved, and the performance of the covenants contained in the lease, although he do not enter on the premises.

"And although it was once held that this did not apply to an assignee upon mortgage (*Eaton* v. *Jaques*, 2 Doug. 455), yet it is now well settled that a mortgagee who takes an assignment of a lease by way of mortgage, although he never enter upon or take possession of the property, becomes liable to the rents and covenants of the lease (*Williams* v. *Bosanquet*, 1819, 1 Brod. & B. 238; 21 R. R. 585). Hence in framing a mortgage of leasehold property it becomes necessary to consider whether the rents and covenants are such as to render the liability to them a serious incumbrance.

"If the rent be trifling and the covenants not of a kind likely to be burdensome, the mortgage should be made by assignment, because it is expedient that the mortgagee should have the whole legal interest rather than a mere derivative estate.

"It is expedient, both for the purposes of a sale and because it precludes the mortgagor from forfeiting, or doing other mischief with, the nominal reversion which is left in him by an underlease. If, however, the rent be large or the covenants of formidable liability, the mortgage should be made by underlease. The mortgagee will not then be liable to the superior landlord in respect of the rent or covenants of the original lease

(*Holford* v. *Hatch*, 1 Doug. 183; *Earl of Derby* v. *Taylor*, 1801, 1 East, 502; 6 R. R. 337; *Galbraith* v. *Cooper*, 1860, 8 H. L. 315; *In re Gee, Ex parte Official Receiver*, 1890, 24 Q. B. D. 65); and the risk that the mortgagor may cause a forfeiture of the term is not usually materially greater where the mortgage is by underlease than where it is by assignment" (Dav. vol. ii. pt. 2, p. 119).

Since Mr. Waley wrote the passage quoted above, the risk of forfeiture has been diminished by the Conveyancing Acts.

It is to be observed that before the C. A. 1881, or the C. L. P. Act, 1850, Chancery relieved against forfeiture for non-payment of rent, on the ground that the power of re-entry was merely security for the rent, and the Court could give compensation.

Chancery did not relieve against forfeiture for other breaches, at anyrate on this ground or in the absence of such special reasons as fraud, mistake, surprise, or acquiescence.

See this explained by Kay, J., in *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417, at p. 425. The right to relief for non-payment of rent was regulated by the Common Law Procedure Acts, 1850 and 1860, 15 & 16 Vict. c. 76, ss. 211 and 212, and 23 & 24 Vict. c. 128, s. 1. See these provisions discussed in the notes to *Sloman* v. *Walter*, 2 *L. C. Equity*, ed. 1897, pp. 261–264. The law as to forfeiture for non-payment of rent has not been altered by the Conveyancing Acts. See C. A. 1881, s. 14, subs. 8.

Relief against forfeiture by breach of covenant to insure was given by the Act 22 & 23 Vict. c. 35 (The Law of Property Amendment Act), ss. 4, 5, and the Act 23 & 24 Vict. c. 128 (the C. L. P. Act, 1860); the provisions in respect to insurance in both these Acts were repealed by the C. A. 1881. The C. A. 1881 contains provisions for relief against other covenants, or rather restrictions on the power of the lessor to enforce a forfeiture without notice to the lessee and claim of compensation in lieu of forfeiture (see s. 14); but it is provided (see s. 14, subs. 6): "This section does not extend —(i.) To a covenant or condition against assigning, underletting (see *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417), parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

"(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to, or to inspect, books, accounts, records, weighing-machines, or other things, or to enter or inspect the mine or the workings thereof."

Sec. 14, subs. 8: "This section shall not affect the law relating to re-entry and forfeiture or relief in case of non-payment of rent." Sec. 14 (9): "This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary." Subsec. 6, as to forfeiture on bankruptcy or alienation, is qualified by sec. 2 of the C. A. 1892.

Though an assignee of a lease was entitled to the benefit of sec. 14, it was held that an underlessee was not, as against the original lessor (*Burt* v. *Gray*, [1891] 2 Q. B. 98; *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226; *Creswell* v. *Davidson*, 1887, 56 L. T. 811); and this might have materially affected the practice of taking mortgages by underlease; but by the C. A. 1892, s. 4, the power of the Court to grant relief is extended so as to apply to underlessees. This is an important provision for mortgagees by underlease; and by sec. 5 of the C. A. 1892, the definition of lease and underlease is extended so as to include agreements for leases or underleases. The Act of 1892 enables the Court to grant relief to an

underlessee in cases where it would not have done so to the lessee (*Wardens, etc., of Cholmeley School, Highgate* v. *Sewell* (No. 2), [1894] 2 Q. B. 906).

As to the form of notice to be given by the lessor under sec. 14 of the C. A. 1881, see *Fletcher* v. *Nokes*, [1897] 1 Ch. 271; and as to service of the notice, see sec. 67 of the Act. As to waiver by the lessor, by receipt of rent, of the right to claim forfeiture, *Bevan* v. *Barnett*, 1897, 13 T. L. R. 310.

It was held in *Skinner Co.* v. *Knight*, [1891] 2 Q. B. 542, that the measure of damages or compensation to be paid to the lessor was to be estimated as damages in action for the breach, and therefore did not extend to the costs of the lessor in consulting an agent or solicitor on title, though this was remedied by the C. A. 1892, s. 2.

The following are other important cases to be considered by a mortgagee of leaseholds. In *Rogers* v. *Rice*, [1892] 2 Ch. 170, it was decided by Kekewich, J., and the Court of Appeal that a lessee cannot apply under sec. 14 of the C. A. 1881 for relief against re-entry or forfeiture for breach of covenant after the lessor has actually re-entered (see also *Quilter* v. *Mapleson*, 1882, 9 Q. B. D. 672). It has been held he can do so in case of forfeiture for non-payment of rent ([1895] 2 Ch. 581), or in other cases where he had applied for relief before re-entry (per North, J., in *Lock* v. *Pearce*, [1892] 2 Ch. 328). In S. C., [1893] 2 Ch. 271, the Court of Appeal held that the application by the lessee must be by writ, not originating summons. When a forfeiture had been incurred under a covenant in a lease, and the lessor had obtained judgment for recovery of possession against the lessee, who allowed judgment to go by default, it appearing that no proper notice had been given, equitable mortgagees of the lessee were relieved on undertaking to perform the covenant, and the judgment by default set aside (*North London Rwy.* v. *Jacques*, 1883, W. N. p. 187; *Jacques* v. *Harrison*, 1883, 12 Q. B. D. 136).

Mr. Waley proceeds, as to mortgage of leaseholds in the common form by demise: "In order to obviate any inconvenience which might arise in the case of a sale, it has been the practice to introduce into the power of sale a special clause in the form of a declaration of trust of the nominal reversion after sale for the purchaser, so as to enable the latter to get in the outstanding reversion under the provisions of the Trustee Acts."

See as to the former law, the Trustee Act, 1850 (13 & 14 Vict. c. 60), and the Extension Act (15 & 16 Vict. c. 55) (see *In re Collingwood*, 1858, 6 W. R. 536; *Steele* v. *Waller*, 1869, 28 Beav. 466); and see *sup.* 481 as to the Trustee Act of 1893. "Modern practice," Mr. Waley proceeds, "would also (as ought to be the case) give to the mortgagor after the sale the right to indemnity, on the ordinary footing of a trustee, from the purchaser in respect of the rent and covenants" (see per Wigram, V.C., 5 Hare, 9).

This form of a declaration of trust for the purchaser was used in the former editions of Davidson's *Precedents*, but it was afterwards considered that it would be an improvement on the practice to substitute a declaration of trust for the mortgagee himself, his executors, administrators, and assigns, so as to enable him, or anyone claiming under him, to obtain a vesting order at any time, which would, it is conceived, be valid as against the mortgagor and all persons deriving title under him, except a person obtaining the legal estate without notice. This form of declaration of trust is accordingly adopted in the present (1881) edition. The editors of Davidson observe, Dav. vol. ii. pt. 2, p. 120, note, that in taking mortgages of leasehold property it is material to bear in mind the provision of the Bankruptcy Act, 1883, as to disclaimer by the trustee in bank-

ruptcy. The Bankruptcy Act of 1869 enabled the trustee in bankruptcy to disclaim a burdensome lease; under this it was determined that the disclaimer puts an end to the lease as against an equitable mortgagee (*In re Woods*, 1876, 3 Ch. D. 459), or a person holding an agreement for an underlease (*Taylor* v. *Gillott*, 1875, L. R. 20 Eq. 682); and even in the case of a first mortgage leaving an ample margin of value, the position of the mortgagee, if equitable, might under these Acts be insecure, as the value of the equity of redemption might be exhausted by subsequent incumbrances, so as to lead to a disclaimer; but that, even under those Acts, it would seem that a legal mortgagee by underlease would not be affected by the disclaimer of the lease, as the disclaimer is to have the operation of a surrender (as to which, see Woodfall on *Landlord and Tenant*, 11th ed., p. 278; *O'Farrell* v. *Stephenson*, 1879, 4 L. R. Ir. 151, decided on the Irish Act, 35 & 36 Vict. c. 58, s. 97). And it has long since been decided that a surrender will not destroy estates or interests previously created by the surrender. The effect of the Act of 1869 is discussed in Robson, ed. 1881, pp. 434–447.

The power of disclaimer by the trustee in bankruptcy is now regulated by sec. 55 of the Bankruptcy Act of 1883 and sec. 13 of the Bankruptcy Act of 1890; by sec. 55 of the Bankruptcy Act of 1883 the trustee is empowered, with the leave of the Court, to disclaim leaseholds burdened with onerous covenants, and the Court can, on the application of any person interested, make an order vesting the disclaimed property in him.

By subsecs. (2) (3) and the rules 320, 321, the disclaimer shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any person; if the bankrupt has created any mortgage or charge on the property, the trustee must serve notice on the person entitled to such mortgage or charge, and if such person require the matter to be brought before the Court, the leave of the Court must be obtained for the disclaimer, without which it would be void.

By subsec. (6) a vesting order is not to be made in favour of any person claiming as mortgagee by demise, excepting on the terms of making each person subject to the same liabilities and obligations as the bankrupt was subject to under the lease. In *In re Finley*, 1888, 21 Q. B. D. 475, a doubt was suggested as to the effect of this proviso on a mortgagee by sub-demise, who had obtained a vesting order. By the Bankruptcy Act of 1890, s. 13, it is enacted, "the Court may, if it thinks fit, modify the terms prescribed by the proviso in subsec. (6) of the same section, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order." See further, as to the right and effect of disclaimer, *In re Cock*, 1887, 20 Q. B. D. 343; *In re Morgan*, 1889, 22 Q. B. D. 592; *In re Smith*, 1890, 25 Q. B. D. 536; see also *Smalley* v. *Hardinge*, 1881, 7 Q. B. D. 524; *Ex parte Walton, In re Levy*, 1881, 17 Ch. D. 746; *Ex parte Burton, In re Müller*, 1880, 15 Ch. D. 289; *Ex parte East and West India Docks, In re Clarke*, 1881, 17 Ch. D. 759; Robbins on *Mortgages*, ed. 1897, pp. 160–162; Ashburner, 9, 10.

General Rule as to Mortgages of Land.—As to all mortgages of land, there are two things essential to the security of the mortgagee:

(1) That he gets the legal estate; see as to this articles TACKING and PURCHASER FOR VALUE WITHOUT NOTICE.

(2) That he gets the title deeds, or obtains a reasonable explanation of

their not being delivered to him. The leading case on this is the *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 1884, 26 Ch. D. 482, in which most of the earlier cases are discussed. The most recent case on the subject is the decision of Romer, J., *In re Castell & Brown Limited*, *Roper* v. *Castell, etc.*, [1898] 1 Ch. 315).

It is an invariable rule that the mortgagee should never allow the mortgagor to retain the deeds unless a notice of the mortgage is indorsed on them.

Registration.—As to mortgages of land in the register of the counties of Middlesex and Yorkshire, and mortgages of land included in the LAND TRANSFER ACT, see REGISTRATION.

Mortgages of Policies of Assurance.—It is important for the mortgagee to have the policy made world-wide, which the office will generally do for a small payment; to get the age of the assured admitted, and also, if possible, the statements on which it was granted. The validity of a policy depends on there having been no misrepresentation as to health or age at the time when it was effected (*Wainwright* v. *Bland*, 1836, 1 Mee. & W. 32; *Everett* v. *Desborough*, 1829, 5 Bing. 503; 30 R. R. 709; *Dackett* v. *Williams*, 1839, 2 Cr. & M. 348; see *Hambrough* v. *Mutual Assurance Co. of New York*, 1895, W. N. 18; 72 L. T. 140), or material concealment (*London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363); but see as to this, Bunyon, ed. 1897, p. 75. Where the policy contains a proviso that it shall be void in case of any of the allegations on which it was granted being untrue, the materiality of a false allegation is not to be taken into consideration (*Anderson* v. *Fitzgerald*, 1853, 4 H. L. 484, overruling the judgment of the Exchequer Chamber in Ireland. See also *Cazenove* v. *British Equitable Insurance Co.*, 1859, 6 C. B. N. S. 437, in Ex. Ch. 1860, 6 Jur. N. S. 826; 29 L. J. C. P. 160, in which there was a misstatement, probably not material, as to the prior illnesses and medical attendants of the assured. See also per Lord Blackburn, *Thomson* v. *Weems*, 1884, 9 App. Cas. 683). As to the construction of conditions referred to and indorsed on a policy, see *Braunstein* v. *Accidental Death Assurance Co.*, 1862, 1 B. & S. 782; and *Thomson* v. *Weems*, *supra*. Most policies on the life of the grantee are in terms avoided by the death of the assured by the hands of justice, or by his own hands, or in a duel. As to the execution of the assured in consequence of a crime committed by him, this merely expresses what the law would imply in the absence of special provision (*Amicable Society* v. *Bolland*, 1830, 4 Bli. N. S. 194; 2 Dow & Cl. 1); and it is probable that the same principle would reach the case of a person feloniously committing suicide while in a sane state of mind (see per Lord Campbell, C.J., in *Moore* v. *Woolsey*, 1854, 4 El. & Bl. 254. See also the *Maybrick* case, *Cleaver* v. *Mutual, etc.*, [1892] 1 Q. B. 151). The Vice-Chancellor (Wood) in *Horn* v. *Anglo-Australian, etc., Insurance Co.*, 1861, 7 Jur. N. S. 673, expresses himself more doubtfully as to this point; but in the absence of special contract, a life policy is not rendered void by the suicide of the assured while in a state of insanity (*Horn* v. *Anglo-Australian, etc., Insurance Co., ubi supra*). With respect to self-destruction, some of the offices expressly provide that it shall annul the policy whether the assured is sane or insane, thus avoiding a question which has given rise to serious differences of judicial opinion; but as to which it appears, in the result, that self-destruction, though committed in an irresponsible state of mind, is within the meaning of the ordinary proviso for avoiding the policy. See *Borrodaile* v. *Hunter*, 1843, 5 Scott N. R. 418; 5 Man. & G. 639; *Clift* v. *Schwabe*, 1846, 3 C. B. 437, 481, note.

In *Dufaur* v. *Professional Life Assurance Co.*, 1858, 25 Beav. 599, in which the policy was to become void if the assured should commit suicide, it was considered to be clear that the words "commit suicide" were not distinguishable from "perish by his own hand."

Where the assurance is on the life of a nominee of the assured, it is usual to omit a provision of the description referred to; and if not expressly inserted, it would not, it seems, in that case be implied even if the suicide were felonious. Where a policy is effected for the purpose of a mortgage, it was for this reason, as well as that of avoiding the necessity of an assignment, formerly usual to take it in the name of the mortgagee; but the contrary practice is now common, for a policy on the life of the assured generally stipulates that it shall be valid to the extent of the interest of any *bonâ fide* assignee, notwithstanding that the assured should commit suicide (see Bunyon, 2nd ed., p. 73, 3rd ed., p. 98; *Moore* v. *Woolsey*, 1854, 4 El. & Bl. 243). As to what is a sufficient assignment within the meaning of the clause, see *Cook* v. *Black*, 1842, 1 Hare, 390; *Dufaur* v. *Professional Life Assurance Co.*, 1858, 25 Beav. 599, in which it was considered that "legally assigned" meant "validly and effectually assigned"; *Jones* v. *Consolidated Investment Co.*, 1858, 26 Beav. 256; *White* v. *British Empire Mutual Life Assurance Co.*, 1868, L. R. 7 Eq. 394. See also *Jackson* v. *Foster*, 1859, 1 El. & El. 463, on appeal, 470, as to assignees in bankruptcy of the assured. And where a policy containing a stipulation to this effect was mortgaged with other property for a sum exceeding the amount of the policy, and the assured committed suicide during a fit of temporary insanity, it was held that the payment of the sum assured to the mortgagee did not give the assurance company any equity against either the property comprised in the mortgage or the estate of the assured, neither the doctrine of marshalling nor that of principal and surety being applicable to such a case (*Solicitors and General Life Assurance Society* v. *Lamb*, 1864, 1 H. & M. 716; affd. on appeal, 2 De G., J. & S. 251; *City Bank* v. *Sovereign Life Co.*, 1884, 50 L. T. 565; Bunyon, 3rd ed., p. 99).

An insurance effected upon a life in which the person effecting it has no interest is void under the Act of 14 Geo. III. c. 48, extended by 29 & 30 Vict. c. 42 to Ireland. The statute prohibits the making an insurance on the life of any person, or on any other event, wherein the person for whose benefit, or on whose account, the policy shall be made, shall have no interest, and renders void every policy made contrary to the Act; it also renders it imperative to insert in the policy the names of the persons interested therein (*Hodson* v. *Observer, etc., Society*, 1857, 8 El. & Bl. 40; *Shilling* v. *Accidental, etc., Company*, 1857, 2 H. & N. 42). But the statute does not prohibit a policy being granted to one person in trust for another, where the names of both persons appear on the face of the policy (*Collett* v. *Morrison*, 1851, 9 Hare, 162). See as to the necessity of inserting the names of persons really interested, *Evans* v. *Bignold*, 1869, L. R. 4 Q. B. 622. But a person has an insurable interest in his own life (*Wainwright* v. *Bland*, 1836, 1 Moo. & R. 481); and a creditor's interest in the life of his debtor is sufficient to give validity to an assurance (*Morland* v. *Isaac*, 1855, 20 Beav. 389; *Drysdale* v. *Piggott*, 1856, 22 Beav. 238); though the debtor be an infant (*Dwyer* v. *Edie*, 2 Park. on *Insurance*, 914). It was formerly held that insurance of lives, as well as of ships, and against fire, was a contract of indemnity; and that where the assured sustained no loss,—as, for instance, where, being a creditor, his debt was paid without having recourse to his policy,—he had no further claim against the insurers. While this doctrine of the necessity of a continuing interest on the part o

the assured was upheld, there was an advantage in a policy effected in the debtor's name, and assigned to the creditor, over one granted to the creditor in his own name, as the assignee, even without consideration, of a person insuring his own life was held to stand upon the rights of the assignor.

This advantage, however, was rather in theory than in fact; for the insurance offices found it essential to their business not to act on the doctrine in *Godsall* v. *Boldero, supra*, but to pay the policy-holder without inquiring whether there was a continuing interest or not. Ultimately the course of practice was followed by that of legal decision in the case of *Dalby* v. *The India and London Life Assurance Co.*, 1854, 15 C. B. 365, in which it was laid down that life assurance is not a contract of indemnity, but simply a contract to pay a certain sum in the event of death; and the case of *Godsall* v. *Boldero* was expressly overruled; see also *Burnard* v. *Rodocanachi*, 1882, 7 App. Cas. p. 340.

Where the insurance is effected in the name of the creditor, the question, unless precluded by the form of the security (or, as in the case of *Salt* v. *Northampton*, [1892] App. Cas. 1, even where there is an express stipulation in the deed), may arise whether the policy belongs to the creditor or is redeemable by the debtor.

There are many cases in which it has been held that, in the absence of contract, express or implied, a policy effected on the life of another will belong to the person who effects it (*Humphrey* v. *Arabin*, 1836, Ll. & G. *temp.* Plunket, 318; see *Brown* v. *Freeman*, 1851, 4 De G. & Sm. 444; *Ex parte Lancaster*, 1851, 4 De G. & Sm. 524; *Gottlieb* v. *Cranch*, 1853, 4 De G., M. & G. 440; *Freme* v. *Brade*, 1858, 2 De G. & J. 582; *Bashford* v. *Cann*, 1863, 33 Beav. 109; *Bruce* v. *Garden*, 1869, L. R. 8 Eq. 430; 1869, L. R. 5 Ch. 32; *Knox* v. *Turner*, 1869, L. R. 9 Eq. 155; 1870, L. R. 5 Ch. 515); but it will be the property of the debtor if upon an insurance by a creditor the debtor pays the premiums (*Holland* v. *Smith*, 6 Esp. 11; but see *Bruce* v. *Garden, ubi supra*), or is charged with them in account (*Morland* v. *Isaac*, 1855, 20 Beav. 389; *Drysdale* v. *Piggott*, 1856, 22 Beav. 238, on appeal; 1856, 8 De G., M. & G. 546; *Salt* v. *Marquess of Northampton*, [1892] App. Cas. 1, see *ante*, p. 471; *Knox* v. *Turner*, 1870, L. R. 5 Ch. 515; *Preston* v. *Neele*, 1879, 12 Ch. D. 760), or an inference otherwise arises that the insurance was intended as a security (*Williams* v. *Atkins*, 1845, 2 Jo. & Lat. 603; *Hawkins* v. *Woodgate*, 1844, 7 Beav. 565 (both cases of annuities); *Lea* v. *Hinton*, 1854, 19 Beav. 324, on appeal; 1854, 5 De G., M. & G. 823. See *Ex parte Andrews*, 1816, 2 Rose, 410; 1 Madd. 573; 16 R. R. 263); and the cases in which it has been held that the policy became the property of the creditor must be read with the explanation in *Salt* v. *Marquess of Northampton, ubi supra*, that if it be part of the contract for the mortgage that the premium should be in any way charged against the debtor, he would be entitled to the policy on redemption, notwithstanding any express stipulation to the contrary in the mortgage deed (see *ante*, p. 471).

A power of attorney to sue for and receive the insurance money was until lately commonly inserted in the assignment of a policy, and the validity of such a power has been recognised, though, from the nature of the case, it cannot come into operation till the death of the principal (Dav. vol. ii. pt. 2, p. 132; *Pearson* v. *Amicable Office*, 1859, 27 Beav. 229). By the Policies of Assurance Act, 1867, 30 & 31 Vict. c. 144, the assignee of a policy who possesses the right in equity to receive and to give an effectual discharge to the office for the policy moneys, and gives a written notice of the assignment to the office according to the requirements of the Act, is

enabled to sue at law in his own name to recover the policy moneys; and the practice of inserting a power of attorney in the assignment of a life policy, whether on a sale or mortgage, is therefore superseded by the Act, and would now, it is conceived, independently of that Act, be rendered unnecessary by the operation of the Supreme Court of Judicature Act, 1873, s. 25, subs. 6; Dav. vol. ii. pt. 2, p. 132. This section only applies to an absolute assignment; but if there is an express assignment in the mortgage deed, the proviso for redemption does not prevent its being within the clause (see *Tancred* v. *Delagoa Bay*, 1889, 23 Q. B. D. 239; and see *infra*, p. 496).

Sec. 3 of the Policies of Assurance Act, 1867, provides that an assignment shall not confer right to sue on a policy until notice to the office, and that date of notice shall regulate priority of assignment. See as to time of notice, *In re Russell*, 1872, L. R. 15 Eq. 30; and see as to the effect of this section not giving prior title to a second mortgagee who took with notice of a prior charge, *Newman* v. *N.*, 1885, 28 Ch. D. 674).

As already noticed (see *supra*, p. 479, and Dav. vol. ii. pt. 2, pp. 14, 131) in the case of policies of assurance, reversionary interests in personal estate, and other choses in action, the proviso for redemption is followed by a declaration of trust—to take effect if the property falls into possession during the security—for the application of the moneys received by the mortgagee in payment of costs, of the mortgage debt and interest, and of the surplus to the mortgagor, and an express power to mortgagee to give receipts for the whole (see for precedent in the case of a policy, Dav. vol. ii. pt. 2, p. 494). It is common now to rely on the power of giving receipts implied under the C. A. 1881.

It has, however, recently been held by the Court of Appeal (see *In re Bell, Jefferey* v. *Sayles*, [1896] 1 Ch. 1), that under a mortgage made in 1819, notwithstanding a wide power of giving receipts, trustees having notice of subsequent incumbrance are not bound to pay the whole fund over to the mortgagee, and, particularly if there is any doubt, they are justified in paying the whole sum into Court (see the case of *Hockey* v. *Western*, [1898] 1 Ch. 350). Having regard to these cases, it may be desirable to put still wider express powers into the mortgage deed. It has been held (*Smith* v. *S.*, [1891] 3 Ch. 550) that payment by trustees to a mortgagee under a trust of this description would not preclude the mortgagee from the right to claim six months' interest in lieu of notice as entry into possession, as in *Bovill* v. *Endle*, [1896] 1 Ch. 648.

It will be seen from the common form of mortgage of a policy given in Davidson's *Precedents*, vol. ii. pt. 2, p. 498, that it contains covenants by the mortgagee not only to keep up the policy and to restore and to effect a new policy if it becomes void or voidable, and to pay premiums and deliver receipts for premiums to the mortgagee, but also that if the mortgagor shall make default the mortgagee may pay the premiums and add the amount, with interest, to his security, though without such a covenant the payment would be allowed to the mortgagee as in the nature of salvage money (see *Leslie* v. *French*, 1883, 23 Ch. D. 552, and cases there cited; see also *Falcke* v. *Scottish Imp. Insurance Co.*, 1886, 34 Ch. D. 234; *In re Earl of Winchilsea's Trusts*, 1888, 39 Ch. D. 168). But see as to this when the mortgagor had become bankrupt, *Shearman* v. *British Empire*, 1872, L. R. 14 Eq. 4; and *Saunders* v. *Dunman*, 1878, 7 Ch. D. 825).

The covenant to keep up the insurance should be in terms negative, *i.e.* that the mortgagor will not do any act by which the policy may be avoided (see Dav. vol. ii. pt. 2, p. 134; and *Dormay* v. *Borrodaile*, 1847, 5 C. B. 380; S. C. 10 Beav. 335).

In the case of a mortgage of a policy, notice to the office is necessary both under the provisions of sec. 3 of the Policies of Insurance Act of 1867, and on the general doctrine that in order to bind third parties the assignment of choses in action must be made as complete as possible. This subject of notice is discussed *supra*, p. 493.

Mortgages of Debts and other Choses in Action.—Mr. Waley proceeds, Dav. vol. ii. pt. 2, p. 136:—

"Besides the particular kind of obligation created by a policy of assurance, other debts, secured and unsecured, may form the subject of mortgages. Unsecured debts can rarely afford a satisfactory security; but it not unfrequently happens that a mortgage is itself transferred by way of security by the mortgagee, thus giving rise to what is called a sub-mortgage."

Dav. vol. ii. pt. 2, p. 136:—

"As, except in the case of negotiable securities, such as bills of exchange, the right of action for a legal debt could not be transferred at common law, the mortgage of a legal debt was effected by means of an assignment, with a power of attorney enabling the assignee to use the name of the assignor, so as to avail himself, for his own benefit, of the assignor's right of action; differing in this respect from the assignment of a merely equitable chose in action, such as an interest in a trust fund, in which a power of attorney was useless, though it was sometimes inserted. But the result of the fusion of jurisdiction of the Courts of common law and equity effected by the Supreme Court of Judicature Act, 1873, would appear to be that an assignee for value (whether absolute or by way of mortgage only) of a legal debt or other chose in action can now in all cases sue in his own name; and it is conceived, therefore, that the insertion of a power of attorney in an assignment of such a chose in action, whether to a purchaser or mortgagee, will in future be wholly unnecessary."

This was published in 1881, and in theory, at least, appears to be sound, apart from the express provision as to the assignment of legal choses in action contained in sec. 25, subsec. 6, of the Judicature Act of 1873.

But it is to be remembered that it may be desirable for the assignee either of a legal or even equitable chose in action to make the assignor co-plaintiff, and a power of attorney would be advantageous to enable this to be done (see *Turquand* v. *Fearon*, 1879, 4 Q. B. D. 280; *Tryon* v. *Nat. Prov. Insurance*, 1886, 16 Q. B. D. 678), and that there has been some difficulty on the authorities in the application of subsec. 6 to assignments by way of mortgage. Mr. Robbins (*Mortgages*, ed. 1897, pp. 305–311) discusses the question whether it is advisable to add the power of attorney or not, and the conclusion at which he arrives is that it would be prudent to insert such a power in a mortgage deed.

Sec. 25, subsec. 6, of the Judicature Act of 1873 (as to which see also vol. i. p. 356) provides:—

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claims thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

On this section it is to be observed, in the first place, that the assignment is to be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed."

It does not affect the rule that the assignee of a chose in action takes subject to all equities available against the assignor (see *In re Milan Tramways Co.*, 1882, 22 Ch. D. 122; and see *infra*, p. 505).

It is also expressed that the assignment, to come within the section, must be absolute, "not purporting to be by way of charge only."

The cases on the section are collected in the note to the section in the *Annual Practice*, ed. 1897, p. 36, ed. 1898, p. 36.

They show that the section deals only with the absolute assignment of legal choses in action, and transfers the debt or other legal chose in action to the assignee, as though it had been his from the beginning. The debt, etc., is his, and he can sue for it in his own name, but he must prove the assignment (*Read* v. *Brown*, 1888, 22 Q. B. D. p. 128; and cp. *Schroeder* v. *Central Bank, etc.*, 1876, 34 L. T. 735, there cited, and *Dibb* v. *Walker*, [1893] 2 Ch. 429).

The subsection is retrospective (*Dibb* v. *Walker*, [1893] 2 Ch. 429).

It has been decided that a mortgage of debts due to the mortgagor, made by deed of assignment, of which express notice in writing is given to the debtor, is an absolute assignment within this section, notwithstanding such deed contains a proviso for redemption and reassignment (*Tancred* v. *Delagoa Bay, etc., Co.*, 1889, 23 Q. B. D. 239, disapproving *National Provincial Bank* v. *Harle*, 1881, 6 Q. B. D. 626, and following *Burlinson* v. *Hall*, 1884, 12 Q. B. D. 347; *Ibberson* v. *Neck*, 1886, 2 T. L. R. 427; and see *Brice* v. *Bannister*, distinguished in *Western Waggon, etc., Co.* v. *West*, [1892] 1 Ch. 271, and in *May* v. *Lane*, 1895, 43 W. R. 193; 64 L. J. Q. B. 236; and see *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 511).

In one case the creditors of B. assigned their debts to C. by deed, on the terms that he should recover the same and pay them to the creditors respectively; it was held to be an absolute assignment (*Comfort* v. *Betts*, [1891] 1 Q. B. 737).

As to the definition of a "chose in action," see 1 Spence Eq. Jur. 852; and cp. *Colonial Bank* v. *Whinney*, 1888, 11 App. Cas. p. 429. The Court in Victoria held it includes all rights the assignment of which a Court of law or equity would before the Act have considered lawful (*King* v. *Victoria Insurance Co.*, [1896] App. Cas. p. 254; see p. 256, where the Privy Council declined to assent to or dissent from the definition).

It has been decided that contracts to lend money or make further advances do not constitute debts (*Western Waggon Co.* v. *West*, [1892] 1 Ch. 271).

And see further, as to what debts and choses of action are assignable, *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Webb* v. *Smith*, 1885, 30 Ch. D. 192; *Harding* v. *H.*, 1886, 17 Q. B. D. 442; *Ingle* v. *M'Cutchan*, 1884, 12 Q. B. D. 519; *Knill* v. *Prowse*, 1884, 33 W. R. 163; and as to assignments of future property, see as to future debts, *Tailby* v. *Official Receiver*, 1880, 13 App. Cas. 523; as to an interest in maintenance, *In re Coleman*, 1888, 39 Ch. D. 443; as to moneys to become due on a policy, *In re Turcan*, 1888, 40 Ch. D. 7; as to future receipts of business, *Ex parte Nichols*, 1883, 22 Ch. D. 782; *In re Davis*, 1889, 22 Q. B. D. 194.

Mortgages of Debts and Choses in Action are subject to Prior Equities.—The great risk in mortgages of debts and choses in action, which is incident also to transfers of mortgages, is that with few exceptions the assignee, notwithstanding that he gets the legal estate, takes it subject to the equities

affecting the chose in action in the hands of the assignor (see the notes to *Ryall* v. *Rowles*, 1 *L. C. Equity*, ed. 1897, p. 799; and see *Mangles* v. *Dixon*, 1852, 3 H. L. 702; *In re Natal Investment Co.*, 1868, L. R. 3 Ch. 355; and see *Roxburghe* v. *Cox*, 1881, 17 Ch. D. 520; *In re Romford*, 1883, 24 Ch. D. 85, case of a transferable debenture).

In *Judd* v. *Green*, 1875, 33 L. T. 597; 45 L. J. Ch. 108, in 1878, the Vice-Chancellor said that the rule that the transferee takes "subject to all equities" must be qualified, and held he took subject to the account, but not to all other equities, *e.g.* the right of the mortgagor to impeach the mortgagee for fraud. A similar decision was given in *Nant-y-glo Ironworks* v. *Tamplin*, 1876, 35 L. T. 125, but these cases are considered to be inconsistent to the principal authorities. See Ashburner, 361.

In consequence of the doctrine that the assignee of a debt takes subject to the equities and the account between the assignor and the debtor, it is important in every case of a mortgage or sub-mortgage of a debt, including a transfer of the mortgage, to obtain the concurrence of the debtor in the deed, or to obtain an answer in writing from him that he has no claim.

Notice.—To guard against priority being gained by a subsequent incumbrance, and the loss of the security, whether by the bankruptcy of the original creditor (if he be a trader, and the debt be due to him in the course of his trade or business) or by his debtor paying him in ignorance, notice of the assignment of the debt by way of mortgage must be given to the debtor. In the case of a sub-mortgage, if the original mortgage debt is secured upon land, notice to the mortgagor could in no case be required with reference to the operation of the bankruptcy law; as the sub-mortgage being, as well as the original mortgage, secured by an estate in land, the doctrine of reputed ownership could not apply (*Jones* v. *Gibbons*, 1804, 9 Ves. 407; 7 R. R. 247; see also *In re Richards, Humber* v. *Richards*, 1890, 45 Ch. D. 589). And, on the same ground, it would seem that the priority of charge of the sub-mortgagee would not be affected by want of notice; but notice should nevertheless be given, as payment by the mortgagor, without notice of the sub-mortgage, to the original mortgagee would be valid against the sub-mortgagee; on the other hand, if the property forming the original security is such that notice would have to be given of its assignment,—as, for example, if a policy of assurance is sub-mortgaged,—notice should be given both to the office and to the grantee of the policy (Dav. vol. ii. pt. 2, p. 138).

Sub-Mortgage.—"Where there is a sub-mortgage, the security will comprise—first, the personal covenant of the sub-mortgagor; secondly, the transfer of the original mortgage debt and mortgaged property, subject to redemption, with the benefit of the power of sale, and other powers and remedial clauses contained in the original mortgage; thirdly, a power of sale enabling the sub-mortgagee to dispose of the original mortgage debt and security at an undervalue. If the sub-mortgagee, as assign of the original mortgagee, sell under the power of sale in the mortgage, he will be enabled by virtue of that power to give receipts to purchasers, which will be effectual discharges so far as regards the mortgagor and those claiming under him; but a further and special receipt clause will be proper, in order to exonerate the purchaser from the necessity of seeing that the sub-mortgagee pays the balance to the original mortgagee" (Dav. vol. ii. pt. 2, pp. 138, 139).

Probably the statutory powers to give receipts in 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 12, were sufficient before 1882, and since

that date the power of giving receipts in the C. A. 1881 would apply, but it is still usual to insert the clause.

On every assignment of a debt by way of security it is essential that the assignee should be specially protected against the obligation which, whether by analogy to a mortgagee in possession, who is bound to account for what he might have received but for his own default, or to a creditor who, by giving time to the principal debtor, discharges the surety (*Gurney* v. *Seppings*, 1846, 2 Ph. Ch. 40–42), would otherwise attach to him to get in the debt in due course under penalty of being charged with the loss in case any arise through his default (*Ex parte Mure*, 1788, 2 Cox, 63; *Williams* v. *Price*, 1824, 1 Sim. & St. 581).

A similar liability would, no doubt, attach to the mortgagee of any chose in action which should be lost or impaired in value by his omitting to get it in at the proper time, and should always be guarded against by a clause protecting the mortgagee against involuntary losses; but it is obvious that there is both much more uncertainty as to the time of realising, and much more risk of loss through the omission to realise at the proper time, where a mere debt is a question than where a title accrues to a specific fund. Hence a mortgagee should be as careful to protect himself in this respect as any other fiduciary owner who acquires the right, and with it assumes the duty of getting in a debt (Dav. vol. ii. pt. 2, p. 140). See as to the case of a trustee, *Maitland* v. *Bateman*, 1844, 13 L. J. Ch. 276; the notes to *Townley* v. *Sherborne*, 1634, 2 *L. C. Equity*, ed. 1897, pp. 649–660; and *In re Chapman*, [1896] 2 Ch. 763.

"As a person who takes a sub-mortgage thereby permits the mortgage debt to be appropriated to the discharge from liability to him of the mortgagee and his estate, the latter is in a position having a great resemblance to that of a surety, and the sub-mortgagee cannot prevent the original mortgagee from getting in the debt from his mortgagor except upon the terms of releasing such mortgagee and his estate from liability. Of course if the debt is got in by the original mortgagee, he is bound to apply it in discharge of the sub-mortgage" (Dav. vol. ii. pt. 2, pp. 141, 142). See as to this, *Gurney* v. *Seppings*, 1846, 2 Ph. Ch. 40; Fisher on *Mortgages*, ed. 1897, p. 354; Robbins on *Mortgages*, pp. 831 and 869.

Notice of Intention to Sell.—In mortgages of real estate the statutory power (see C. A. 1881, s. 67, subs. 3) makes a notice affixed to or left on the property sufficient notice of intention to sell. This, of course, does not apply in the case of mortgages, of choses in action, or personal estate not being leaseholds. It has been the practice of certain conveyancers to insert in the mortgage deed a provision that service of notice may be made at some specified address in England, with power for the mortgagor by notice to change the address. As regards notice of legal proceedings, such a provision was held by the Court of Appeal to be valid in an agreement for sale where the defendant was a domiciled Scotchman (see *Montgomery, Jones, & Co.* v. *Liebenthal, etc.*, C. A. Feb. 1, 1898; 46 W. R. 292; [1898] 1 Q. B. 487).

Mortgages of Fixtures.—The present law as to these is discussed in W. & T. *L. C. Equity*, vol. ii. pp. 70–76.

If the title is not affected by the Bills of Sale Acts, the mortgagee of land can claim fixtures though they do not belong to his mortgagor (see *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and the cases reviewed in the judgment of the Court of Appeal).

As regards the mortgagee's position under the Bills of Sale Acts; when the Act of 1878 was passed, a mortgage of fixtures, whether by deed (*Ex parte Barclay, In re Joyce*, 1874, L. R. 9 Ch. 577; *Boyd* v.

Shorrock, 1867, L. R. 5 Eq. 72; *Climie* v. *Wood*, 1869, L. R. 4 Ex. 328, in Exch. Chamb.; *Holland* v. *Hodgson*, Exch. Chamb. 1872, L. R. 7 C. P. 329; *Mather* v. *Fraser*, 1856, 2 Kay & J. 536) or deposit with (*Ex parte Astbury*, 1869, L. R. 4 Ch. 630; *Ex parte Barclay, In re Gawan*, 1855, 5 De G., M. & G. 403) or without (*Longbottom* v. *Berry*, 1869, L. R. 5 Q. B. 123) a memorandum, passed the fixtures to the mortgagee as part of the land, provided there was simply a mortgage of the land, and no separate assignment, power of sale, or power of removal of the fixtures; but *contra*, if with the assurance there were an assignment by a separate witnessing part (*Begbie* v. *Fenwick*, 1871, L. R. 8 Ch. 1075 (*n.*)), or by the same witnessing part with a separate *habendum* to the mortgagee absolutely (*In re Eslich, Ex parte Alexander*, 1876, 4 Ch. D. 503), or by the same witnessing part separately, with an omission of the *habendum* as to the fixtures, while the *habendum* as to the land was for the term (*Ex parte Brown, In re Reed*, 1878, 9 Ch. D. 390), or a power of severing or selling fixtures separately (*In re Daglish, Ex parte Wilde*, 1873, L. R. 8 Ch. 1070) the mortgage, if unregistered, was void as against holders of registered bills of sale, or execution creditors, or a trustee in bankruptcy or liquidation. But it seems that while the Bills of Sale Act, 1854, was in force, any mortgage including fixtures, though only a mortgage by deposit with memorandum, was valid as to fixtures as between the mortgagee on the one hand and, on the other, the mortgagor, or any person other than the holder of a registered bill of sale, execution creditor, or creditor in bankruptcy (*Meux* v. *Jacobs*, 1875, L. R. 7 H. L. 481; and see *Richards* v. *James*, 1867, L. R. 2 Q. B. 285).

The Bills of Sale Act, 1878, by sec. 4, included in "personal chattels" all fixtures and growing crops where "separately" assigned, but, excepting "trade machinery," excluded from "personal chattels" all other fixtures when assigned with any freehold or leasehold land to which they were attached. By sec. 5 trade machinery is defined to be machinery in or attached to any factory or workshop, exclusive of (1) the fixed motive power, (2) fixed power machinery, and (3) pipes therein mentioned. Sec. 7 enacted that no fixtures or growing crops should be deemed to be separately assigned by reason only of being assigned by separate words, or that power was given to sever them, provided that by the same instrument any freehold or leasehold interest was assigned with the land to which they were attached; and that the construction should be retrospective and apply to mortgages before the Act. See as to this provision, *In re Moore & Robinsons' Banking Co.*, 1880, 14 Ch. D. 379.

Sec. 7 removed the old distinctions as regards fixtures other than trade machinery.

It seems to be a question whether they do not remain with respect to trade machinery.

Sec. 5 of the Act of 1878 enacted—

"From and after the commencement of this Act trade machinery shall for the purposes of this Act be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act."

The Court of Appeal, *In re Yates*, 1888, 38 Ch. D. 112, decided that a conveyance of the land, without separate words of conveyance of the machinery, passed the fixed trade machinery free from the Bills of Sale Acts. See also *Ex parte Lusty*, 1889, 60 L. T. 160, and *In re Brooke*, [1894] 2 Ch. 600. But the case of *Small* v. *National Provincial Bank of England*, [1894] 1 Ch. 686, shows that in any mortgage of property to which is

affixed trade machinery, special care must be taken not to have anything which can be construed as a separate assignment of the machinery. There Stirling, J., held that the words "together with all and singular the fixed moveable plant, machinery, and fixtures," taken with the words of the covenant for insurance, brought the case within the Bills of Sale Act. But see the decision of Kekewich, J., in *In re Brooke*, [1894] 2 Ch. 600.

Mortgages to secure Further Advances.—The established rule in these cases is that if a first mortgagee, whose mortgage is expressed to secure any further advances that may be made, makes a further advance after notice of a second mortgage, although the first mortgage may pass the legal estate, and the second mortgage is expressed to be subject to the first, the further advance is subject to the second mortgage (*Shaw* v. *Neale*, 1858, 6 H. L. 581; *Hopkinson* v. *Rolt*, 1861, 9 H. L. 514; *London, etc., Banking Co.* v. *Radcliffe*, 1881, 6 App. Cas. 722; *Bradford Banking Co.* v. *Briggs*, 1886, 12 App. Cas. 29). It is known as the rule in *Hopkinson* v. *Rolt*. It was said by Romilly, M. R., in *Menzies* v. *Lightfoot*, 1871, L. R. 11 Eq. 468:—"The principle upon which these cases proceed is this, that the second charge was so framed as if it had said 'subject to the security as it stands at the moment,' that is, to the amount of money now due on the security. If the parties wish to escape from this, they must say, 'subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of £ .'"

Of course, if the first mortgagee has the legal estate, and the further advance is made by him *without notice* of an intervening advance by the second mortgagee, the first mortgagee will have priority over the second mortgagee, not only in respect of his first, but also in respect of his second advance (*Brace* v. *Marlborough*, 1728, 2 Ph. 494; *Shepherd* v. *Titley*, 1742, 2 Atk. 350); nor will the first mortgagee lose his priority over the second mortgagee if subsequently thereto he renews a bill of exchange given for the sum advanced on the first mortgage (*Calisher* v. *Forbes*, 1872, 7 Ch. 109).

On the other hand, if there had been an equitable first mortgage of land to secure further advances, it would appear that a further advance made without notice, but after an intermediate charge, would be postponed to it (*ibid.*).

The doctrine of *Rolt* v. *Hopkinson*, *supra*, 1861, 9 H. L. 514, has created considerable difficulty where the mortgagee has expressly agreed to make further advances, particularly where, as in the common case of financing a builder, the mortgagor had only an equitable interest in the land to be mortgaged. The practice of conveyancers has not, it is believed, been uniform. Some have inserted a clause that the further advance should not be required if any intermediate charge had been made. But this, in the case of an equitable mortgage of land, did not relieve the mortgagee from the risk that a subsequent charge might have been made and not disclosed. Others have assumed that the express contract to make further advances would exclude the doctrine of *Rolt* v. *Hopkinson*, and this was held to be correct in the recent case of *West* v. *Williams*, 1898, 46 W. R. 362; 67 L. J. Ch. 213.

Sureties.—If a surety joins in the mortgage deed, care must be taken to insert the common form providing that, as between the mortgagee and the surety, the surety is to be treated as a principal debtor, otherwise the surety might be released by time being given to the debtor, or alteration of the security (see the position of the surety discussed in the notes to *Rees* v. *Berrington*, 1795, 2 *L. C. Equity*, ed. 1897, pp. 573–605; 3 R. R. 3; and see

the note on Dav. vol. ii. pt. 2, pp. 502–509; and for the common clause inserted in mortgage deeds as to sureties, see Dav. vol. ii. pt. 2, p. 501). Where a wife joins with a husband in a mortgage, it is advisable to insert the claim (see *infra, Mortgages by Husband and Wife*).

If there be no such provision in the deed in any agreement with the principal debtor, the mortgagee must be careful to make an express reservation of the right to go against the surety; such reservation will amount to a contract by the principal debtor, that if the creditor proceed against the surety, the latter shall not be deprived of his remedy against the principal debtor; and hence when time is given under the reservation, the surety is not discharged (*Boultbee* v. *Stubbs*, 1810, 18 Ves. 20; 11 R. R. 141; *Owen* v. *Honan*, 1853, 4 H. L. 997, 1037; *Kearsley* v. *Cole*, 1846, 16 Mee. & W. 136; *Webb* v. *Hewitt*, 1857, 3 Kay & J. 438–442).

Mortgages by Deposit.—Equitable Charges or Liens.—In the old cases it was treated as doubtful whether a mortgage by deposit, without any memorandum, gave a right to have a legal mortgage (*Roberts* v. *Croft*, 1857, 2 De G. & J. 1; *Matthews* v. *Goodday*, 1862, 31 L. J. Ch. 282).

The modern cases lay down that a mere deposit of deeds, without any memorandum of agreement, implies an agreement to execute a legal mortgage (per Jessel, M. R., in *Carter* v. *Wake*, 1877, 4 Ch. D. 606; *Mellor* v. *Porter*, 1883, 25 Ch. D. 159; *Wade* v. *Wilson*, 1882, 22 Ch. D. 235; *Oldham* v. *Stringer*, 1885, 33 W. R. 251; and per Stirling, J., *In re Owen*, [1894] 3 Ch. 227; see also Seton, ed. 1893, p. 117; Fisher on *Mortgages*, 3rd ed. 510, 4th ed. 480, 5th ed. 447; see also *James* v. *James*, 1873, 16 Eq. 153; *Backhouse* v. *Charlton*, 1878, 8 Ch. D. 448, establishing that a mortgagee by deposit is entitled to foreclosure; see *ante*, vol. v. tit. FORECLOSURE, p. 407; but see Ashburner, p. 337).

It is curious that *James* v. *James*, *supra*, 1873, L. R. 16 Eq. 153, which is generally referred to as settling the rule that a deposit of deeds without a memorandum gave a right to foreclosure, on the ground that it implies an agreement to execute a formal mortgage, is expressly based on a case of *Pryce* v. *Bury*, 1853, cited in a note to *James* v. *James*, 16 Eq. 153, reported in 23 L. J. Ch. p. 676; 17 Jur. p. 1173; 18 Jur. 967; 2 W. R. pp. 6 and 216; 2 Dr. 11, 41, in which (1) there was an agreement to execute such a mortgage (see *ante*, vol. v. p. 407, tit. FORECLOSURE), though it was arguable that it did not extend to the particular interest involved; (2) that *James* v. *James*, *supra*, laid down that the proper remedy of an equitable mortgagee was foreclosure and not sale, which seems to be contrary to other established authorities.

Thus Lord Hatherley, in *Tennant* v. *Trenchard*, 1869, L. R. 4 Ch. 542, says: "It seems, on the whole, to be settled that if there is a charge *simpliciter*, and not a mortgage, or an agreement for mortgage, then the right of the parties having such a charge is a sale, and not foreclosure."

This passage is quoted with approval by Stirling J., in *In re Owen*, [1894] 3 Ch. 237 (see also per Lindley, L.J., in *Marshall* v. *South Staffordshire, etc.*, [1895] 2 Ch. 50, referring to *Neate* v. *Duke of Marlborough*, 1838, 3 Myl. & Cr. 407, 417), excepting only what is acquired under statutory powers, the object of which would be defeated by a sale (see Ashburner, p. 341, and cases there cited).

Notice.—In every case of a mortgage or transfer of an equitable mortgage, whether of land or other property, whether subject to a prior legal mortgage or being a mortgage of an equitable estate or interest, notice should be given to the prior mortgagee or other holder of the legal estate or interest, otherwise the equitable mortgage might be defeated or post-

poned by a conveyance of the legal estate or interest without notice, or by further advances by a first legal mortgagee without notice.

Subject to this, the doctrine of notices giving priority between successive incumbrances does not apply to mortgages of land, legal or equitable, or transfers of such mortgages (*Jones* v. *Gibbons*, 1804, 9 Ves. Jun. 407; 7 R. R. 247; *Ex parte M'Kay*, 1 M. D. & D. G. 550; and *Ex parte Barnett*, 1 De G. 194; *In re Richards*, *Humber* v. *Richards*, 1890, 45 Ch. D. 589; *Union Bank of London* v. *Kent*, 1888, 39 Ch. D. 242).

The doctrine of notice giving priority does, however, apply to an interest in the proceeds of real estate directed to be converted (*In re Wyatt*, [1892] 1 Ch. 188; *Foster* v. *Cockerell*, 1835, 3 Cl. & Fin. 456, 476; *Lee* v. *Howlett*, 1856, 2 Kay & J. 531).

To a portion to be raised out of real estate by sale, mortgage, or otherwise (*In re Hughes*, 1864, 2 Hem. & M. 89).

To a share in trust moneys vested in trustees and secured on a mortgage of land (see *Daniel* v. *Freeman*, 11 Ir. R. Eq. 233, where the Court held that the assignee's interest was money, and not an interest in land).

To a legacy charged on real estate (*Arden* v. *Arden*, 1885, 29 Ch. D. 702).

To all assignments of interests in moneys or investments vested in trustees, and choses in action (see 1 *L. C. Equity*, ed. 1897, notes to *Ryall* v. *Rowles*; and what is generally referred to as the rule in *Dearle* v. *Hall*, 1823, 3 Russ. 1).

The cases establishing the rules as to notice are discussed generally in the notes to *Ryall* v. *Rowles*, 1747–50, 1 *L. C. Equity*, ed. 1897, vol. i. p. 96, and 2 *L. C. Equity*, pp. 38 *et seq.*, where the rules and the leading authorities for them are given shortly as follows:—

Notice is not necessary to perfect the assignments between assignor and assignee (*Dearle* v. *Hall*, 1823, 3 Russ. 1; and see *ante*, vol. i. p. 116).

It is necessary to preserve priority against a subsequent assignee (see *ante*, vol. i. pp. 121, 126; *Dearle* v. *Hall*, *supra*; *Low* v. *Bouverie*, [1891] 3 Ch. 102; *Foster* v. *Cockerell*, *supra*; *Ward* v. *Duncombe*, [1893] App. Cas. 369).

Where the fund is in the hands of the trustees for the assignor, notice must be given to the trustees, or one of them.

Where it is in Court in an action for execution of trusts in which the assignor is interested, a stop order, instead of notice to the trustees, is required to give priority (*Greening* v. *Beckford*, 1832, 5 Sim. 195; *Pinnock* v. *Bailey*, 1883, 23 Ch. D. 497; *Mutual Life Assurance Society* v. *Langley*, 1886, 32 Ch. D. 460; *Ward* v. *Duncombe*, *supra*).

But if notice has been given to the trustees before the fund was paid into Court, the assignee does not lose priority by not obtaining a stop order (*Livesay* v. *Harding*, 1856, 23 Beav. 141; *Brearcliffe* v. *Dorrington*, 1850, 4 De G. & Sm. 122).

Where there is a primary and derivative settlement, notice must be given to the trustees who are trustees for the assignor (*Stephens* v. *Green*, [1895] 2 Ch. 149, approving of *Holt* v *Dewell*, 1845, 4 Ha. 446, and overruling *In re Booth's Settlement*, 1853, 1 W. R. 444; 21 L. T. 239 (O. S.), and the dicta in *Bridge* v. *Beadon*, 1867, 3 Eq. 664), though the funds may be vested in others. A similar rule applies if the funds are in Court in an action in which the Court is not in the position of trustee for the assignor; and a stop order will not then be sufficient, but notice must be given to the trustees who are trustees for the assignor (*Stephens* v. *Green*, *supra*). The prudent and proper course, however, is to give notice to the trustees of both settlements.

Notice to one trustee is sufficient so long as he remains trustee; and notice given to all the trustees of a subsequent assignment while such one trustee remains trustee does not affect the position when such trustee dies or ceases to be trustee, if the second assignment was taken while he was trustee; but the notice remains good to preserve priority against all subsequent assignments made while that trustee remained trustee (*Smith* v. *Smith*, 1833, 2 Cr. & M. 231; *Wills* v. *Greenhill*, 1861, 4 De F. & G. 147; *Ward* v. *Duncombe*, *supra*).

More difficulty arises where the trustee or trustees who have notice die or cease to be trustees, and afterwards an assignment is made, and notice of it given to the new trustees. It has been questioned whether this second notice gives the second assignees priority over the first or not (see *ante*, vol. i. pp. 116–120).

New trustees are not affected by implied notice of an incumbrance of which notice was given to a retiring trustee (*Low* v. *Bouverie*, [1891] 3 Ch. 102; see p. 104).

It was decided by the Court of Appeal (*ibid.*) that a trustee is not bound to answer inquiries of a *cestui-que* trust, or his assignee as to notices of incumbrances by such *cestui-que* trust. This creates a great difficulty in dealing with interests in trust funds. But it seems that a trustee is bound to produce to a *cestui-que* trust all documents relating to the trust (*In re Cowin*, *Cowin* v. *Gravett*, 1886, 33 Ch. D. 179; and see *In re Tillott*, [1892] 1 Ch. 87, and *In re Dartnall*, *Sawyer* v. *Goddard*, [1895] 1 Ch. 474); and if he refused to answer inquiries, he might be required to produce all notices in writing in his possession. Notice to solicitors usually acting for the trustees is not notice to the trustees, unless the solicitor has authority to receive such notice (*Saffron Walden, etc.* v. *Rayner*, 1880, 14 Ch. D. 406).

An incumbrancer who has at the time of his advance notice of a prior incumbrance cannot obtain priority of charge on a fund in Court by obtaining a stop order (*In re Holmes*, 1885, 29 Ch. D. 786; see R. S. C. 1883, Order 46, r. 12, and notes, *Annual Practice*, 1897, pp. 875, 876). He can do so if he had no notice at the time of his advance, but had notice at the time of obtaining his stop order (*Mutual Life Association* v. *Langley*, 1886, 32 Ch. D. 460).

Notice to a trustee, to be operative, must be given after and not before he becomes trustee for the assignor.

Thus it has been held that the notice to an army agent of the assignment of the sole proceeds of an officer's commission must be given after the fund became the officer's property, *i.e.* after the date when the retirement was gazetted (*Somerset* v. *Cox*, 1865, 33 Beav. 634; *Buller* v. *Plunkett*, 1860, 1 J. & H. 441; *Calisher* v. *Forbes*, 1871, 7 Ch. 109; *Addison* v. *Cox*, 1872, 8 Ch. 76; *Johnstone* v. *Cox*, 1880, 16 Ch. D. 571; 1881, 19 Ch. D. 17; *Roxburghe* v. *Cox*, 1880, 17 Ch. D. 520, p. 527).

Such assignments, or any assignments of non-existing property, or property in which the assignor has no estate or interest at the date of the assignment, are in fact void as assignments, and only operate as covenants to assign, taking effect in equity when the property is acquired, or some interest in it is acquired. See as to this rule, *Holroyd* v. *Marshall*, 1861, 10 H. L. 191; *Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 523; or as to the assignment being defeated in case bankruptcy intervenes before the property or some interest in it is acquired, *Collyer* v. *Isaacs*, 1881, 19 Ch. D. 342; *Ex parte Hall*, 1879, 10 Ch. D. p. 615; *Western Waggon, etc., Co.* v. *West*, [1892] 1 Ch. 271).

The question whether a purchaser or mortgagee is affected with notice by reason of some common practice or business has been raised in the case of mortgages of a company. In *Wheatley* v. *Silkstone Coal Co.*, 1885, 29 Ch. D. 715, it was decided that a company who had issued debentures on floating security can mortgage the real estate; and in *English Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700, it was held that a mortgagee who knew there were debentures, but did not know they occupied the property in question, was not affected with notice that they did. The practice now is to put into the debentures a clause restricting the company from mortgaging or selling the real estate. In the recent case of *In re Castell & Brown Ltd., Roper* v. *Castell & Brown Ltd.*, [1898] 1 Ch. 315, Romer, J., decided that a bank who took a mortgage by deposit of deeds by a company, without notice that the company had issued debentures with a clause restricting the company from mortgaging, was not affected with notice of the debentures, and obtained priority by possession of the deeds. It may be that, according to the case of *English, etc., Co.* v. *Brunton*, they would not have been affected by notice if they had notice that there were debentures, but were not informed that they restrained the company from mortgaging; but Romer, J., rested his judgment on the fact that the bank had had no notice that debentures had been issued, and if having regard to the common practice of putting a restriction on mortgages into a floating debenture, a mortgagee who had notice that debentures had been issued would be imprudent if he did not require evidence that they did not prevent the mortgage. The case illustrates the risk of leaving deeds in the hands of a mortgagor without indorsing notice of the mortgage on them.

Transfers of Mortgages.—A transfer of an existing mortgage so often forms part of the transaction where a new mortgage is made, that an article on mortgages would be incomplete without some observations on transfers.

The most important point to consider is the application of the doctrine of notice.

Notice is in no case necessary to perfect the transaction as between assignor and assignee (*Dearle* v. *Hall*, 1823, 3 Russ. 1), or (in the case of an assignment by a company) as against the liquidator (*Gorringe* v. *Irwill*, 1886, 34 Ch. D. 128), or as against the trustee in bankruptcy of the assignor, who takes subject to the equities which affected the bankrupt (*Ex parte Stewart*, 1864, 4 De G., J & S. 543; *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 434), unless the chose in action was of such a character as to come within the order and disposition clause. That now in force (s. 44 of the Bankruptcy Act of 1883) only applies to such choses in action as trade debts; see *infra*.

But as regards priority,—alike in the case of a mortgage, and the transfer of a mortgage, of a debt other than chose in action, trust funds in the hands of trustees, or proceeds of sale of land,—priority of charge depends upon priority of notice to the debtor or holder of the fund (see *ante*, p. 501).

In the case of a mortgage of land there is both the debt, a chose in action, and the land; and it was decided in *Jones* v. *Gibbons*, 1804, 9 Ves. 407; 7 R. R. 247, that in a transfer of the land the debt necessarily passed as incident to it, and that notice was not necessary to perfect the assignment; and it was held that without notice to the debtor the title of the assignee was good against the assignee in bankruptcy of the mortgagor. This decision was followed in *Ex parte M'Kay*, 1 M. D. & D. G. 550; *Ex parte Barnett*, 1 De G. 194; and in *In re Richards, Humber* v. *Richards*, 1890, 45 Ch. D. 589, it was held that the principle applied as between successive

equitable mortgagees, and that the one prior in date had priority though the second first gave notice to the mortgagor.

In citing *Jones* v. *Gibbons, ubi supra*, and the other bankruptcy cases above cited as authorities, it must be remembered that they were before the Bankruptcy Act of 1861, when the doctrine of reputed ownership applied to all bankrupts and all choses in action, under which the assignee of a trust fund had to give notice to the trustees, and the assignee of a chose in action had to give notice to the debtor, in order to get priority over a trustee in bankruptcy, though notice before notice of the bankruptcy would give priority (*Stuart* v. *Cockerell*, 1869, 8 Eq. 607; *In re Russell's Policy Trust*, 1872, L. R. 15 Eq. 26).

By the Bankruptcy Act, 1883 (s. 44), it is provided that choses in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed good within the meaning of the section as to reputed ownership (see as to this clause, *Colonial Bank* v. *Whinney*, 1885, 30 Ch. 261, 289; 11 App. Cas. 426). Consequently, except as to choses in action, within this section a transfer of a mortgage which would be good as between assignor and assignee would also be good as against the trustee in bankruptcy, though of such a character that, as between successive assignees, the date of notice would give priority.

Transfer subject to Equities.—It must be remembered that a transfer of a mortgage is, so far as regards the mortgage debt, an assignment of a chose in action, and subject to the rule stated *ante*, p. 496, that the assignee takes subject to the equities between the assignor and the original debtor. It is important, therefore, to obtain the concurrence of the mortgagor in the transfer, or an admission in writing from him that the debt is due.

The question has not apparently been the subject of express decision how far this doctrine affects a purchase from a transferee of a mortgage. It is generally considered that the provisions for protection of purchasers in the power of sale conferred by the C. A. 1881, or the old form of well-drawn powers of sale, would be sufficient to prevent a purchaser without notice being affected by an equity of the original mortgagor or person claiming through him, at least if the purchaser gets the legal estate. The view is supported by the recent case of *Bailey* v. *Barnes*, [1894] 1 Ch. 25. In this case, B. had an equitable charge on the equity of redemption of J. in certain land, subject to a legal mortgage. The mortgagee who held the legal mortgage transferred it to A., who, two days afterwards, purported to convey under the power of sale to H. for the exact sum which A. had paid to the legal mortgagees on the transfer. This sale was collusive. Subsequently H. mortgaged the land for £6000; and in August 13, 1890, H. having died, her executor, E., sold and conveyed to L. for £2500, the equity of redemption, subject to the £6000 mortgage. On August 15, 1890, B. brought an action against J., A., and E. to have it declared, that he was entitled to redeem as against them as equitable incumbrancer of J. In November 1892 the Court of Appeal declared that he was so entitled, and in effect that, as between B. and J., A. and E., the sale to H. was to be treated as a mortgage only. L. was not a party; but on receiving notice of it, he paid off the legal mortgage and took a transfer of the legal estate. It was held by Stirling, J., and the Court of Appeal that he was entitled to rely on the legal estate, Stirling, J., resting his judgment on the provision for protection of purchasers in the C. A. 1881; the Court of Appeal on the ground that he was a purchaser for value who had paid his purchase money without notice of B.'s equity, and was entitled to protect himself by the legal estate.

Transfer after entering into Possession.—It must be remembered that, as the authorities at present stand, a mortgagee would be ill-advised if he transferred his security after he had entered into possession. See sec. 15, subsec. 2, of the C. A. 1881, which, while giving a mortgagor redeeming the right to require from the mortgagee a transfer instead of a reconveyance, excepts the case of a mortgagee having been in possession. The reason for this exception is that it has long been assumed to be law that a mortgagee who has entered into possession is responsible not only for his own defaults while he is in possession, but also for those committed by his transferee after transfer. The doctrine seems to be founded on no intelligible principle of law or convenience, but it has been stated for many years in books of authority as settled law.

The statement was originally grounded entirely on the following passage in 1 *Equity Cases Abridged*, ed. 1792:—

"If a mortgagee in possession assigns over his mortgage without assent of the mortgagor, the mortgagee is bound to answer the profits both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent; but *quære* if the mortgagor hides so that he cannot be served with a subpœna to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment."

The report refers, as the authority for this statement, to 3 Ch. Cas. 3, which is a wrong reference, as there is nothing on the point at the place cited. The authority intended to be referred to is no doubt *Venables* v. *Foyle*, 1 Ch. Cas. 2; 12 Car. II., a complicated case which seems to have involved questions of breach of trust and collusion; the assignment appears not to have been a transfer of mortgage, but absolutely of the leasehold mortgaged, taking a covenant for indemnity against the mortgagor, etc. It does not seem to establish any rule beyond that laid down by the Privy Council in the case of *National Bank of Australasia* v. *United, etc., Co.*, 1879, 4 App. Cas. 391, see p. 409, which is thus given in the marginal note: "A mortgagee is accountable not merely for his actual receipts while in possession of the mortgaged property, but also for whatever is received by them to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor." This seems to the writer the proper rule.

Mortgagees must, however, until the point is otherwise expressly decided, consider that if they transfer after entering into possession, they may be liable for all defaults of their transferees. For not only has this been stated as settled law in text-books of authority, but it seems to be recognised by sec. 15, subsec. (2), Conv. A. 1881. And in the modern case of *Hall* v. *Heward*, 1886, 32 Ch. D. 432, counsel for a mortgagee who had entered into possession objected to an order being made, in a redemption suit, that the mortgagee should transfer, on the ground that it would expose him to liability for default of his transferee. The three judges of the Court of Appeal said that this only applied where there was a voluntary transfer, and not where it was ordered by the Court, recognising the rule as valid in law. And in *In re Prytherch*, 1889, 42 Ch. D. 590, North, J., said a mortgagee who has entered into possession could not give up possession at his pleasure, and refused his application for a receiver on this ground.

Miscellaneous Cases.—Wife joining in Mortgage with Husband.—Whenever a wife joins with her husband in mortgaging the wife's estate, it is advisable to add the common surety clause.

Before the M. W. P. Act, 1882, in many cases it was presumed that the wife was a surety for the husband, although the money was expressed to be paid to both her and her husband (see the old case of *Huntingdon* v. *H.*, 1702, 2 Vern. 437; 1716, 1 Bro. P. C. 1; and see the presumption explained by Wood, V.C., in *Hudson* v. *Carmichael*, 1854, Kay, 613). In the recent case of *Paget* v. *P.*, [1898] 1 Ch. 55, Kekewich, J., treated the rule as still subsisting, though he decided that it did not apply where the money was borrowed for payment of the husband's debts, under an order of the Court, enabling the wife to bind her separate estate for the purpose, notwithstanding a restraint on anticipation. This decision was affirmed by the Court of Appeal (see L. T. Paper, April 2, 1898; as to the wife's estate on reconveyance, see *infra*, RECONVEYANCE).

Antecedent Debts.—Where a mortgage is to be made to secure an antecedent debt, care must be taken to see that it does not comprise the whole or substantially the whole of the mortgagor's property, unless there is a further advance, sufficient to enable him to continue in business in which he may be engaged, or prevent his being practically insolvent, otherwise such a mortgage would be an act of bankruptcy (see s. 48 of the Bankruptcy Act, 1883; Williams on *Bankruptcy*, ed. 1888, p. 275; Ashburner, p. 12).

If there is a further advance, it is said by Mellish, L.J., in *Ex parte Ellis*, 1876, 2 Ch. D. 798, it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business (see also *Ex parte King*, 1875, 2 Ch. D. 256; *Ex parte Johnson, In re Chapman*, 1884, 26 Ch. D. 338; *Administrator General of Jamaica* v. *Lascelles, In re Rees*, [1894] App. Cas. 135, where the Privy Council approved of the above cited cases).

Appointed Shares.—In the common case of a mortgage of a share in trust funds, or property subject to a limited power of appointment, as the ordinary case of power to appoint among children, care must be taken to ascertain as far as possible that the appointment was not made in pursuance of an agreement, or even an understanding with the appointor, that the property shall be applied for the benefit of the appointor, or of any person not within the power, otherwise the appointment would be bad under the doctrine of *Topham* v. *Duke of Portland, nom. Portland* v. *Topham*, 1864, 11 H. L. 32; see the cases as to this discussed in White and Tudor, *L. C. Equity*, ed. 1897, vol. ii. pp. 315-321, and the notes to *Aleyn* v. *Belchier*, 1758, 1 Eden, 132 (*n.*); and for a recent case on the subject in *In re Perkins*, [1893] 1 Ch. 283.

The doctrine does not apply to a release of such a power, and such a release has been held valid when made for the benefit of the person releasing it. See the recent decision of the Court of Appeal in *In re Radcliffe*, [1892] 1 Ch. 234, and of Chitty, J., in *In re Soames*, [1896] 1 Ch. 250. If therefore a release would answer the purpose of a mortgage, it is better to obtain a release than an appointment under the power, and if an appointment has been made, it may often be advisable to obtain a release of the power, subject to the appointment.

In all cases the mortgage should expressly extend to any interest the mortgagor might take, whether under the appointment or in default of appointment (see *Lovell* v. *L.*, [1898] 1 Ch. 82).

Beneficiary and Trustee.—In a mortgage by a beneficiary who is also a trustee of the property mortgaged, it is specially important to obtain strict evidence of the accounts of the trustee. The mortgage is subject to the special risk that there is a paramount lien implied by law on the beneficial

interest of the trustee to make good any breaches of trust he may have committed.

Solicitors' Mortgages.—If there is anything exceptional in the circumstances when a mortgage is made by a client to a solicitor, it is advisable he should require the client to be separately advised, and in any case the solicitor, if he acts for both, should take special care to explain unusual clauses (*Cockburn* v. *Edwards*, 1881, 18 Ch. D. 455; *Craddock* v. *Rodgers*, 51 L. T. 191; 53 L. J. Ch. 198); and if the solicitor buys at less than their value prior mortgages by the client, he can only hold them for sums actually paid by him (*M'Leod* v. *Jones*, 24 Ch. D. 289).

In the common case of a solicitor taking with his retainer a general security for costs on the interest of the client, it is prudent to insert that the charge is only to apply to such interests of the client, if any, as can be charged without bringing into effect a gift over or forfeiture clause of the interest.

Brewers' Mortgages.—In mortgages of public-houses to brewers, it is usual to insert a covenant that the mortgagor shall buy beer of the mortgagees. *Primâ facie* this would appear to come within the rule against collateral advantages considered *supra*. There seems to be no practical objection to them. They would, of course, cease to operate on redemption of the mortgage, and if the mortgagor takes beer in pursuance of the covenant he will be bound to pay (see *supra*, pp. 470, 471), and if he refused to take the beer, the mortgagee would call in the security. These covenants are referred to as common in brewers' mortgages by the Court in *Catt* v. *Tourle*, 1869, 4 Ch. D. 654, though the particular case did not relate to a mortgage.

Business Premises.—Where a mortgage is taken of premises in which a business is carried on, it is important to include the business, as otherwise if the interest falls in arrear and a receiver is appointed he cannot be empowered to carry on the business (*Whitley* v. *Challis*, [1892] 2 Ch. 64).

Statutory Mortgage.—The Conveyancing Act, 1881, provides a short form of mortgage implying covenants and powers (see C. A. 1881, s. 26, and schedule, and Key and Elphinstone's *Precedents*, ed. 1897, p. 79).

Keeping Old Mortgage Debts alive.—When a new mortgage is made of an estate already incumbered, and prior mortgages are paid off, it is often expedient to keep these on foot as a protection against any mesne incumbrances, especially if the new mortgagee does not get the legal estate. An express declaration as to this is advisable, though the intention to keep the old debt alive is often implied (see *Thorne* v. *Cann*, [1895] App. Cas. 11; *Liquidation Estate, etc., Co.* v. *Willoughby*, in which the decision of the Court of Appeal ([1896], 1 Ch. 726) was reversed by the House of Lords; see note of case, L. T. Paper, April 16, 1898, p. 478).

Trustees' Mortgages.—The settled practice is to keep notice of the trust, off the title, and to take the mortgage to the trustees as joint-tenants, the receipt clause expressing that the money is advanced out of moneys belonging to them on a joint account, and on an appointment of new trustees to transfer to them with a simple recital that they had become entitled in equity to the mortgage debt (see 2 White and Tudor, ed. 1897, pp. 223, 224). The practice is recognised in the case of *Harman* v. *Uxbridge Rwy. Co.*, 24 Ch. D. 720, 726; *Carritt* v. *Real, etc., Advance Co.*, 42 Ch. D. 262; Dav. vol. ii. pt. 2, pp. 51, 318. It is convenient to have a separate declaration of trust of the money (for a form, see Dav. vol. v. pt. 2, p. 650, ed. 1878), or a memorandum to be indorsed on a settlement of the investment (*ibid.* p. 652).

Mortgages to Firms.—A mortgage to a firm for a current account would, as a rule, not extend to dealings after a change of firm, but may be extended to them by express declaration (*Strange* v. *Lee*, 1803, 3 East, 491), or by implication (*Metcalf* v. *Bruin*, 1810, 12 East, 400; Dav. vol. ii. pt. 2, pp. 372, 373 *n.*).

Reconveyance.—Before the Conveyancing Act, 1881 (see Dav. vol. ii. pt. 2, p. 280), a mortgagee on being paid off was not bound to assign the debt. All that could be required was a reconveyance of the mortgaged property (*Dunstan* v. *Patterson*, 1847, 2 Ph. 341; *Smith* v. *Green*, 1844, 1 Coll. 555). By the C. A. 1881, s. 15, a mortgagor is entitled on payment to require the mortgagee to transfer, unless the mortgagee has been in possession. It was held that this did not apply except in cases where the mortgagor could have required a simple reconveyance (*Teevan* v. *Smith*, 1882, 20 Ch. D. 724). In consequence, sec. 12 of the C. A. 1882 provided that the right conferred by sec. 15 of the C. A. 1881 should belong to each incumbrancer of the mortgagor, notwithstanding intermediate incumbrances. As to the right of a tenant for life redeeming, see *Alderson* v. *Elgey*, 1884, 26 Ch. D. 567. On the question to whom the mortgagee may transfer when there are more than one subsequent incumbrancer, and the question whether a mortgagee could give preference to a third over a second incumbrancer, see *West London, etc.* v. *Reliance, etc., Co.*, 1885, 29 Ch. D. 960.

Where there are subsequent incumbrancers, a reconveyance should expressly preserve their priorities (*Teevan* v. *Smith*, 1882, 20 Ch. D. 724; *West London Commercial Bank* v. *Reliance, etc., Society*, 1885, 29 Ch. D. 954).

In connection with reconveyance, the form of the proviso for redemption must be considered. Although it may not in terms follow the title as existing at the date of the mortgage, it is presumed that the intention is it should do so, unless there be clear indication to the contrary (Dav. vol. ii. pt. 2, p. 38; Butler's note to *Co. Litt.* 208 *a*; *Hastings* v. *Astley*, 1861, 30 Beav. 260; *Plomley* v. *Felton*, 1888, 14 App. Cas. 61; *In re Byron*, [1891] 3 Ch. 475); and in the case of a wife's estate (*Jackson* v. *Innes*, 1819, 1 Bli. 104; *In re Bettons Trust Estate*, 1871, 12 Eq. 553; *Whitbread* v. *Smith*, 1854, 3 De G., M. & G. 737; *Jones* v. *Davies*, 1878, 8 Ch. D. 205).

The Application of the Statutes of Limitation to Mortgages.—(*a*) Before 1834, the Act 3 & 4 Will. IV. c. 27, Courts of equity were not in express terms included in any statute, yet in the case of legal rights Courts of equity were said to act in obedience (*Hovenden* v. *Lord Annesley*, 1806, 2 Sch. & Lef. 630, 631; *Foley* v. *Hill*, 1844, 1 Ph. 399; *Knox* v. *Gye*, 1872, L. R. 5 H. L. 656; *St. Mary Magdalen* v. *A.-G.*, 1857, 6 H. L. 207), and in the case of equitable claims by way of analogy to the Statute of James. Nevertheless, if the circumstances were such as to make it against conscience to insist on the statute, the Courts of equity would not treat the right as barred (*Bond* v. *Hopkins*, 1802, 1 Sch. & Lef. 412; see p. 429).

As regards the Rights in rem of a Mortgagee of Land.—Before 3 & 4 Will. IV. c. 27, a mortgagor in possession was presumed, both at law and in equity, to hold by permission of and not adversely to the mortgagee, and unless the presumption were rebutted time would not run in favour of a mortgagor, but after twenty years' possession by a mortgagor without payment or acknowledgment, the Court would presume and direct a jury to find (in the absence of evidence to the contrary) that the debt had been satisfied (Hewitt on *Limitations*, p. 113; *Hall d. Doe* v. *Surtees*, 1822, 5 Barn. & Ald. 687, 690; *Doe d. Jones* v. *Williams*, 1836, 5 Ad. & E. 291; *Heath* v. *Pugh*, 1881, 6 Q. B. D. 359).

As regards the Right of the Mortgagor to redeem.—The Statute of

Limitations (21 Jac. I. c. 16) did not apply to suits in equity, but Courts of equity, acting by analogy to the rules of law and the provisions of the first and second sections of that Act, refused to allow a mortgagor to redeem after the mortgagee had been in possession for twenty years, unless an acknowledgment had been given or there were other circumstances showing that the possession was not "adverse," or unless the mortgagor at the time when possession was taken was under disability (Hewitt, p. 134; Sugd. R. P. S. 111; *Rafferty* v. *King*, 1836, 1 Keen, 601; *Anon.*, 1746, 3 Atk. 313).

As regards the personal remedies of the mortgagee, 21 Jac. I. c. 16, s. 3, relating to simple contract debts, applied in the absence of a covenant for payment (Hewitt, p. 5; *Brocklehurst* v. *Jessop*, 1835, 7 Sim. 438; *Ancaster* v. *Mayer*, 1785, 1 Bro. C. C. 464, 465).

As regards the right to sue on a covenant in the mortgage deed. Before 1833 there was no statutory bar to an action for the recovery of a specialty debt, but after the lapse of twenty years the debt would be presumed to have been satisfied, and in the absence of rebutting evidence (Hewitt, p. 8; *Moodie* v. *Bannister*, 1859, 4 Drew. 441) the Court would direct a jury to presume payment.

(*b*) In 1833 two statutes were passed affecting mortgagees—3 & 4 Will. IV. c. 27, relating to the remedy in, and 3 & 4 Will. IV. c. 42, dealing with the personal remedy on, a covenant or specialty. Neither of these statutes makes any reference to the other, and there has been some difficulty in reconciling them.

Sec. 2 of 3 & 4 Will. IV. c. 27 relates to any entry or action for recovery of land, and makes the bar twenty years after the right shall have accrued. An action by a mortgagee to recover the land at law comes within this section, and so also (having regard to sec. 24) does an action by a mortgagee for foreclosure come within this section (*Harlock* v. *Ashberry*, 1882, 19 Ch. D. 539). Sec. 3 specifies when the right to make entry or bring an action shall be deemed to have accrued.

Sec. 24 limits the right to sue in equity for "land or rent" to the period within which under the Act an action might be brought at law. The section only applies to suits for the recovery of land or rent, and in terms seems to apply only to "equitable" claims, and to bar them so far as they would have been barred if legal (*Archbold* v. *Scully*, 1861, 9 H. L. 360); but it has been held that a foreclosure action is an action to recover land, and the section applies to an action by a legal mortgagee (*Heath* v. *Pugh*, 1881, 6 Q. B. D. 345, 364; 7 App. Cas. 235; *Harlock* v. *Ashberry*, 1882, 19 Ch. D. 539), as well as to an action by an equitable mortgagee.

Sec. 28 applied to suits for redemption by mortgagors, and thereby it was in effect enacted that no suit should be brought to redeem land or rent where the mortgagee had been in possession or receipt of the profits of such land, or in receipt of such rent, but within twenty years from the time when the mortgagee obtained such possession or receipt, unless in the meantime some acknowledgment of title has been given "to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or some person claiming through him." Sec. 40 provides that no proceedings shall be brought to recover moneys secured upon land or rent but within twenty years after a present right to receive the same shall have accrued, or some payment of principal or interest shall have been made, or "some acknowledgment of the right thereto given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent." Sec. 42 in somewhat similar terms fixes a limit of six years for the recovery

of arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent. Sec. 26 applies to the case of concealed fraud. Sec. 27 preserves the jurisdiction of Courts of equity to refuse relief on the ground of acquiescence or otherwise. Sec. 28 provides that an acknowledgment by an owner of a divided or undivided part shall only operate to keep the right alive against such owner and part. By sec. 34, at the determination of the period limited by the Act for making an entry or taking proceedings, the right and title of the person to the "land, rent, or advowson," for the recovery whereof such entry or proceedings might have been made or brought within such period, is absolutely extinguished. Secs. 28 and 40 were repealed by the Real Property Limitation Act of 1874, and re-enacted with the substitution of twelve years for twenty by secs. 1, 7, and 8 of that Act.

It will be observed that under secs. 40 and 42 of 3 & 4 Will. IV. c. 27, a mortgagee's right to principal and interest is kept alive by part payment or payment of interest. But the sections relating to the recovery of the land (ss. 2 and 3) do not contain a similar provision, and having regard to the wording of sec. 2, applying to all actions, whether by mortgagees or others, to recover land or rent, and the provisions of sec. 3 as to the date when the right to sue shall be deemed to have accrued in respect of an interest in possession, a doubt was suggested whether a mortgagee might not be barred notwithstanding interest being paid (see *Doe d. Jones* v. *Williams*, 1836, 5 Ad. & E. 291, see p. 295; and see per Lord Westbury in *Chinnery* v. *Evans*, 1864, 11 H. L. 115, at p. 133), and in consequence the Act 7 Will. IV. & 1 Vict. c. 28 was passed, enacting that a person claiming under a mortgage might bring an action to recover the land (not in terms extending to a rent) at any time within twenty years after the last payment of principal and interest. See this Act discussed in *Doe* v. *Massey*, 1851, 17 Q. B. 373; *Thornton* v. *France*, [1897] 2 Q. B. 143; *Eyre* v. *Walsh*, 10 Ir. C. L. R. 346; *Heath* v. *Pugh*, 1881, 6 Q. B. D. 345, on app. *nom. Pugh* v. *Heath*, 1882, 7 App. Cas. 335; and *Thornton* v. *France*, [1897] 2 Q. B. 156.

Express Trusts.—Sec. 25 of 3 & 4 Will. IV. c. 27 provides, when *land or rent* is vested in a trustee on an *express trust*, time shall not begin to run against the *cestui-que trust* until the property has been conveyed to a purchaser for value, and then only in favour of such purchaser. It was held that sec. 25 was not limited to claims to recover land or rent, but extended to and modified claims under sec. 40, where land was vested in trustees to raise or secure payment of charges (see per Lord St. Leonards in *Burrowes* v. *Gore*, 1857, 6 H. L. 907, see p. 961; and see *Young* v. *Waterpark*, 1842, 13 Sim. 199, on appeal, 15 L. J. Ch. 63; *Blair* v. *Nugent*, 1846, 3 Jo. & Lat. 658; and *Lawton* v. *Ford*, 1866, 2 Eq. 97); or annuities (*Ward* v. *Arch*, 1842, 12 Sim. 472); and that it also extended to claims under sec. 42, to arrears of rent or of interest upon money charged upon land (and see Lord Blackburn's judgment in *Thomson* v. *Eastwood*, 1877, 2 App. Cas. 215, see p. 255); and though Lord Cairns and Lord Hatherley, in their judgments in that case, declined to say that this was clear, in the later case of *Cunningham* v. *Foot*, 1878, 3 App. Cas. 974 (*Cox* v. *Dolman*, 1852, 2 De G., M. & G. 592), Lord Cairns said that that clause (s. 25) had always been held to modify the enactment in the 42nd section. And see cases where a trust term was treated (*Cox* v. *Dolman*, 1852, 2 De G., M. & G. 592; *Hunter* v. *Nockolds*, 1849, 1 M. & G. 640; *Lewis* v. *Duncombe*, 1861, 29 Beav. 175; *Shaw* v. *Johnson*, 1861, 1 Drew. & Sm. 412; *Knight* v. *Bowyer*, 1858, 2 De G. & J. 442; see Hewitt, pp. 179–183). These cases were before the date when the Act

of 1874 (37 & 38 Vict. c. 57) came in force. See, as to the effect of this, Hewitt, pp. 179–183. The fact that a mortgage was in the form of a trust for sale did not bring it within the operation of sec. 25 of 3 & 4 Will. IV. c. 27, or prevent the operation of sec. 28, a deed so framed being merely a particular form of mortgage (*Locking* v. *Parker*, 1872, 8 Ch. 30; *In re Alison, Johnson* v. *Mounsey*, 1879, 11 Ch. D. 284; *Kirkwood* v. *Thompson*, 1865, 2 Hem. & M. 392).

In *In re Alison* (1879, 11 Ch. D. 284) the mortgage was made in 1827, and the mortgagee entered into possession in 1849, and never afterwards acknowledged the mortgagor's title; he died in 1874, having devised to trustees, who sold in 1876: it was held by the Court of Appeal that the devisees of the mortgagee, taking as trustees under his will (although they sold and conveyed by a deed reciting the mortgage and that the sale was made in pursuance of the powers of the mortgage and the will) did not thereby, and could not, set up the old title of the mortgagor, which was then barred and extinguished by sec. 34, and that the mortgagor had no interest in the proceeds of sale.

In *Chapman* v. *Corpe* (1879, 27 W. R. 781), which was the case of an ordinary mortgage containing an express power of sale, with a provision that the surplus proceeds of sale should be held on "trust" for the mortgagor, his executors, administrators, and assigns, the mortgaged property was sold after the title of the mortgagor had been barred by the statute; there was conflicting evidence on the question whether the sale was expressed to be made under the power or not, but it was held that when the estate of the mortgagor in the equity of redemption was extinguished, the trust of the surplus proceeds of sale was also extinguished and the mortgagee absolutely entitled.

It seems, however, that if in the case of a mortgage in the form of a trust for sale (as in *Locking* v. *Parker* or *In re Alison, supra*), or in the case of a mortgage containing a power of sale which in terms declares a trust of the surplus proceeds of sale (as in *Chapman* v. *Corpe, supra*), the sale takes place before the mortgagor's right is barred by the statute, the mortgagee would become an express trustee of the proceeds (see judgment of James, L.J., in *Locking* v. *Parker*, 1872, 8 Ch. at p. 30, decided in 1872; and see per Baggallay, L.J., in *In re Alison*, 1879, 11 Ch. D. at p. 298, heard in 1879), and therefore could not have claimed a title to the surplus money after paying his debt under or by analogy to any Statute of Limitation then in force. So, also, Chitty, J., in 1886, in a claim in a creditor's action for administration instituted in 1881, held that in the case of an ordinary mortgage with a power of sale and a provision that the mortgagee should hold the surplus proceeds of sale in trust for the mortgagor, the mortgagee selling under the power before the bar had taken effect would become an express trustee, and neither he nor his solicitor, B., who retained the surplus proceeds, could set up any Statute of Limitations as a bar to the mortgagor's claim to the surplus proceeds of sale (*In re Bell*, 1886, 34 Ch. D. 462; and see *Chapman* v. *Corpe, supra*; *Charles* v. *Jones*, 1887, 35 Ch. D. 544; *Locking* v. *Parker, supra*; and *In re Alison*, 1879, 11 Ch. D. 284, *supra*). The result would apparently be the same where a sale is made by a mortgagee under the statutory power (see C. A. 1881, s 21, subs. (3)). Sec. 25 only includes "express" trusts, and does not apply to constructive trusts (*St. Mary Magdalen* v. *A.-G.*, 1857, 6 H. L. 189; *Pyrah* v. *Woodcock*, 1871, 19 W. R. 462), and accordingly the statute runs in the case of constructive trusts.

So also in the case of constructive trusts of personal estate not within

sec. 25 of 3 & 4 Will. IV., it has been held that time runs. In *Banner* v. *Berridge*, heard in 1881 (18 Ch. D. 254), there was a mortgage in January 1873 of a ship without an express power of sale, and therefore without any express trust of the surplus proceeds, the mortgagee sold under the statutory power conferred by sec. 71 of the Merchant Shipping Act, 1854. Kay, J., held that the mortgagee was only a constructive and not an express trustee of the proceeds of sale, and was therefore not prevented from setting up the plea that the claim of the mortgagor was barred by the Statute of Limitations (21 Jac. I. c. 16, s. 3).

Sec. 25 of 3 & 4 Will. IV. c. 27 only applies to claims within that statute, and therefore does not apply to actions for the recovery of personal estate other than money charged on land or rent. But sec. 25, subs. 2, of the Judicature Act, 1873, provides: "No claim of a *cestui-que trust* against his trustee for any property held on an express trust shall be held to be barred by any Statute of Limitations." This enactment in effect extends sec. 25 of 3 & 4 Will. IV. c. 27 to personal estate (per Kay, J., *Banner* v *Berridge*, 1881, 18 Ch. D. see p. 262), and see as to words *cestui-que trust* and trustee, *Dooby* v. *Watson* (1888, 39 Ch. D. p. 182; see also *In re Jane Davis*, [1891] 3 Ch. 119), and that this is generally a statutory declaration of the rule in equity (per Baggallay, L.J., *In re Cross*, 1882, 20 Ch. D. 121). 37 & 38 Vict. c. 57, passed the next year to the Judicature Act, repeals and re-enacts secs. 2, 28, and 40 of the Act of 3 & 4 Will. IV. c. 27, with the alteration of twelve years for twenty, and substitutes six years for ten, and twelve for twenty in other provisions, and subject thereto declares that that Act and the Act 7 Will. IV. c. 28 should be construed together. As to the *statutory modifications* of the rule that time will not run in favour of an express trustee, sec. 10 of 37 & 38 Vict. c. 57 provides that "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any '*land or rent*' at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." It is not clear whether express trustees could claim the benefit of this section (see Hewitt on *Limitations*, pp. 179–184).

In order to reconcile subsec. 2 of sec. 25 of the Judicature Act of 1873 and the provision of sec. 10 of 37 & 38 Vict. c. 57, it has been suggested (see Lewin on *Trusts*, 8th ed., p. 885; 9th ed., p. 1008) that the section of the Judicature Act applies as between trustee and *cestui-que trust*, and sec. 10 of the Act (37 & 38 Vict. c. 57) applies as between the land charged and the persons entitled to the charge. But Mr. Hewitt (p. 181) points out that the authorities usually cited for this proposition (*Fearnside* v. *Flint*, 1882, 22 Ch. D. 579; *Hughes* v. *Coles*, 1884, 27 Ch. D. 231) do not establish it. This question, however, is not very material to mortgagees, since the surplus proceeds of sale do not appear to be "money charged upon land" within the meaning of sec. 10 of 37 & 38 Vict. c. 57.

The Trustee Act, 1888 (51 & 52 Vict. c. 59, s. 8), gives trustees the right to plead any Statute of Limitations where one applies, and if none applies, then to plead lapse of time as a bar to the like extent as if the claim had been in an action of debt, and to do this in case of any claim, with the exception of claims founded on fraud or fraudulent breaches of trust to which the trustee was party or privy, or to recover trust property,

or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his own use. The definition of trustee in this Act is very wide, and includes both express and constructive trustees (see the Act discussed by Mr. Hewitt in his work on *Limitations*, pp. 184–190).

This enactment would not protect a mortgagee who retains the surplus proceeds of sale for his own use, but it would generally protect a mortgagee who pays the surplus by mistake to the wrong person, or, as is often the case, lets his solicitor as agent receive and apply the money. In the case of *Thorne* v. *Heard* ([1895] App. Cas. 495), where the mortgagees had allowed their solicitor to receive the purchase-money and had been paid by him the amount owing on their mortgage, and the solicitor had subsequently become bankrupt without paying over the balance, it was held after the lapse of six years that the mortgagees were protected by sec. 8 of the Trustee Act of 1888. An argument was raised in the case that the solicitor received the money as agent for the mortgagees, and that consequently while retained by him it was constructively retained by his principal, the mortgagees; and in the Court of Appeal ([1894] 1 Ch. 599, see p. 609), Lord Justice Kay intimated that while the money was in the solicitor's hands, and could have been recovered from him by the mortgagees, it might possibly be treated as in the hands of the mortgagees, but that at anyrate after the bankruptcy of the solicitor the agency was determined, and the mortgagees could not be considered to retain the moneys. In the House of Lords, Lord Herschell held on the facts that the leaving the money in the hands of the solicitor, believing that he was entitled to distribute it, was clearly not a retention by the mortgagees.

The rule that prevailed prior to the Statute of Limitations (3 & 4 Will. IV. c. 27), that no lapse of time barred the right of the mortgagor of lands to redeem the *whole*, provided he held *possession of part* (Sel. Ca. in Ch. 55; 1728, 2 P. Wms. 511), has been abolished by sec. 28 of the statute. Hence, it has been held that where a mortgagee had been in undisturbed possession of part of the land in the mortgage for upwards of twenty years, the right of the mortgagor to redeem that part of the land was barred although he held possession of the remainder (*Kinsman* v. *Rouse*, 1881, 17 Ch. D. 104, and sec. 16 of 3 & 4 Will. IV. c. 27); saving the rights of persons under disability, such as absence beyond seas, does not apply as between a mortgagor and mortgagee (*ibid.*).

Possession under the Act of 3 & 4 Will. IV. c. 27, or the Act of 1874, need not be "*adverse*" in the sense in which that term was formerly used, *i.e.* so as to be inconsistent with the person entitled having the freehold, and in fact amounting to such a change of seisin as to be a tortious freehold (see Hewitt, p. 72; note to *Nepean* v. *Doe* and *Taylor* v. *Horde*, 1837, 2 Sm. *L. C.* 542; and First Report of Real Property, p. 494), but it is still necessary that the possession should be adverse in the sense that it must be by a person claiming and intending to hold as owner (Hewitt, p. 73; *Lyell* v. *Kennedy*, 1889, 14 App. Cas. 437, see p. 460; *Scott* v. *S.*, 1854, 4 H. L. 1065, see p. 1085). So, in like manner, time will not run in favour of a mortgagee under sec. 28 (*i.e.* s. 7 of 37 & 38 Vict. c. 57) unless he holds possession in his character of mortgagee (Hewitt, p. 135). Accordingly time will not under this Act run against the mortgagor while the possession of the mortgagee may be referred to another lawful title. Thus, in *Hyde* v. *Dallaway* (1843, 2 Ha. 528), where a person to whom an estate was mortgaged by the tenant for life and remainderman purchased the interest of the tenant for life, after having been in possession, without any acknowledgment of the

mortgagor's title for six years, and then continued in possession for twenty years, it was held by Sir James Wigram, V.C., that such possession was not adverse during the existence of the life estate so purchased, and that the Statute 3 & 4 Will. IV. c. 27, s. 28, was not, therefore, a bar to any suit for redemption by the remainderman (see also *Rafferty* v. *King*, 1836, 1 Keen, 601; *Price* v. *Copner*, 1823, 1 S. & S. 347). The result is the same where a mortgagee of the fee acquires a life interest in the mortgaged property *before* he enters into possession.

Acknowledgments by Mortgagee.—Before the passing of 3 & 4 Will. IV. c. 27, a very slight act or admission, even by parol, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title, so as to save his right to redeem. This was altered by the Statute 3 & 4 Will. IV. c. 27, which defines the acknowledgment necessary in the various cases to prevent time running. *First as to acknowledgments by a "mortgagee,"* adopting the summary given by Mr. Hewitt (p. 141), referring to the 7th section of the Act of 1874, which limits the period to twelve years, but otherwise on this point is similar to sec. 28 of the Act of 1883, it appears that—

(1) The acknowledgment must be given to the mortgagor or some person claiming his estate (*Batchelor* v. *Middleton*, 1847, 6 Ha. 83; *Lucas* v. *Dennison*, 1843, 13 Sim. 584; and see *Markwick* v. *Hardingham*, 1880, 15 Ch. D. 339), or to the agent of such mortgagor or person (*Trulock* v. *Robey*, 1841, 12 Sim. 402; 2 Ph. 396; and see *Stansfield* v. *Hobson*, 1853, 3 De G., M. & G. 620).

(2) It must be given by the mortgagee or the person claiming through him. An acknowledgment by the mortgagee's agent is not sufficient (see *Richardson* v. *Younge*, 1871, 6 Ch. p. 480; and cp. *Ley* v. *Peter*, 1858, 3 H. & N. 101; 27 L. J. Ex. 239; but see *Corporation of Dublin* v. *Judge*, 1847, 11 Ir. L. R. 8).

(3) It must be in writing and signed. (As to what is such a writing, see *Incorporated Society of Dublin* v. *Richards*, 1881, 1 Dr. & War. 258, 290; *Fursdon* v. *Clogg*, 1842, 10 Mee. & W. 572; *Stansfield* v. *Hobson*, 1853, 3 De G., M. & G. 620.)

(4) An acknowledgment by one of several mortgagors will preserve the title of all the co-mortgagors.

(5) An acknowledgment by one of several mortgagees will only affect the interest of the party making the acknowledgment.

It was held in *Richardson* v. *Younge* (1871, L. R. 6 Ch. p. 480) that an acknowledgment given by one only of two joint-mortgagees, who on the face of the mortgage deed were shown to have advanced the money on a joint account as trustees, did not keep alive the right against any part of the property, but was wholly inoperative.

Except as mentioned above, it is not essential that the acknowledgment should be in any particular form, nor is it essential that the amount actually due should be stated (*Trulock* v. *Robey*, 1841, 12 Sim. 402; 2 Ph. 396; *Lord St. John* v. *Broughton*, 1838, 9 Sim. 219; *Stansfield* v. *Hobson*, 1853, 16 B. 236; 3 De G., M. & G. 620; *Prance* v. *Sympson*, 1854, Kay, 678), and it may be made by an answer in Chancery (*Goode* v. *Job*, 1858, 1 El. & El. 6), an affidavit in a suit, or in a schedule to a deed, or in the Insolvent Debtor's Court (*Blair* v. *Nugent*, 1846, 3 Jo. & Lat. 658), as well as by a letter or other writing (*Stansfield* v. *Hobson*, 1853, 16 B. 236; 3 De G., M. & G. 620). An acknowledgment, however, will not be inferred from equivocal expressions, especially if coupled with a denial of the mortgagor's claim (*Thompson* v. *Bowyer*, 1863, 9 Jur. N. S. 863; 11 W. R. (M. R.) 975).

Keeping accounts as mortgagee in possession not communicated to the mortgagor will not prevent time running (*In re Alison*, 1879, 11 Ch. D. 284; and see *Baker* v. *Wetton*, 1845, 14 Sim. 426). If the mortgagor be a party to an assignment of the mortgage this may be sufficient acknowledgment of his title (*Batchelor* v. *Middleton*, 1847, 6 Ha. 75), but not an assignment to which he is not party, though expressed to be subject to the equity of redemption (*Lucas* v. *Dennison*, 1843, 13 Sim. 484; *In re Alison*, 1879, 11 Ch. D. 284). It has been held that the acknowledgment of the mortgagee binds his lessee (*Ball* v. *Lord Riversdale*, 1816, Beat. 550). That an admission of title by a tenant in tail under the will of a mortgagee in fee in possession will bind those in remainder (*Pendleton* v. *Rooth*, 1859, 1 Gif. 35; 1 De G., F. & J. 81). In this case, as in *Stansfield* v. *Hobson*, *infra*, the acknowledgment appears to have been given after the mortgagee had been in possession twenty years; the Court seems to have held, however, on the evidence that the right of the mortgagor was subsisting at the time the acknowledgment was given, otherwise, according to later cases, it could not have set up a non-existent title.

In *Stansfield* v. *Hobson* (1853, 3 De G., M. & G. 620), more than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of a meeting, unless someone is ready with the money to pay me off." It was held by the Lords Justices, affirming the decree of Sir John Romilly, M. R. (16 B. 236), that the letter of the mortgagee was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations. But as regards an acknowledgment made, as in this case after the bar of the statute has taken place, it has since been held that, as the title is absolutely extinguished by sec. 34 of 3 & 4 Will. IV. c. 27, an acknowledgment after the bar cannot set it up, but is inoperative (see *infra*, *Sanders* v. *S.*, 1881, 19 Ch. D. 373; *Henning* v. *Blanton*, 1873, 21 W. R. 636; *In re Alison*, 1879, 11 Ch. D. 284; *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219).

It must be borne in mind, in considering the cases above cited as to acknowledgment, that they relate to acknowledgments by the "mortgagee" under sec. 28 of 3 & 4 Will. IV. c. 27, or sec. 7 of 37 & 38 Vict. c. 57, and not to acknowledgments by the "mortgagor or person liable to pay," under sec. 40 of 3 & 4 Will. IV. c. 27, or sec. 8 of 37 & 38 Vict. c. 57, or sec. 42 of 3 & 4 Will. IV. c. 27. To acknowledgments under which sections somewhat different considerations apply, see Mr. Hewitt's book, pp. 144, 145, and it would be rash to take the decisions on any one section of these Acts as applying to any other.

Acknowledgment by Mortgagor.—Sec. 8 of 37 & 38 Vict. c. 57 (re-enacting, with the alteration of twelve years for twenty, sec. 40 of 3 & 4 Will. IV. c. 27) provides that the bar shall apply *unless* in the meantime some part of the principal money or some interest therein shall have been paid or some acknowledgment of the right thereto shall have been given, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent. Sec. 42 of 3 & 4 Will. IV. c. 27 limits any claim to arrears of rent or interest on moneys charged on land or legacies to six years after the same shall have become due or next after acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person to whom the same was payable, or his agent. The terms as to acknowledgment in these two sections seem similar to those of sec. 7 of the Act of 1874, as to acknowledg-

ments by mortgagees to this extent, that the acknowledgment must be in writing and it must be given to the person entitled thereto, or his agent. But under sec. 8 of 37 & 38 Vict. c. 57, and sec. 42 of 3 & 4 Will. IV. c. 27, acknowledgment by an agent is effectual, whereas under sec. 7 of 37 & 38 Vict. c. 57, the acknowledgment must be signed by the mortgagee, or "the person claiming through him." This appears to be the principal difference in the section. In *St. John* v. *Broughton* (1838, 9 Sim. 214) it was held that an acknowledgment under sec. 40 of 3 & 4 Will. IV. c. 27, by a devisee in trust of the debtor, or by the agent of such trustee, was sufficient, and in *Toft* v. *Stephenson* (1851, 1 De G., M. & G. 28), that such an acknowledgment might be given by a trustee appointed by the Court. Having regard to the decision in *Richardson* v. *Younge* (1871, 6 Ch. 480) on acknowledgment by mortgagees, that an acknowledgment given by one of two joint trustee mortgagees was inoperative, it is a question whether an acknowledgment of one of two trustee mortgagors would be good, but otherwise it would seem that the general rule that an acknowledgment by one of two joint debtors binds all would apply to acknowledgments under these sections, whether they were liable jointly, or one as principal and the other as surety, and that an acknowledgment under sec. 42 of 3 & 4 Will. IV. c. 27, or sec. 8 of 37 & 38 Vict. c. 57, by a tenant for life, would be sufficient against those entitled in remainder (Hewitt, pp. 143–145). See cases as to payment by a tenant for life, *infra*.

It has been held that an acknowledgment given to a first mortgagee by a mortgagor who has made subsequent incumbrances will not bind subsequent mortgagees (*Bolding* v. *Lane*, 1863, 1 De G., J. & S. 122). See further, as to acknowledgments under secs. 40 and 42 of 3 & 4 Will. IV. c. 27, *Holland* v. *Clark* (1842, 1 Y. & C. C. 151, see p. 169; and see *Grenfell* v. *Girdlestone*, 1837, 2 Y. & C. Ex. 676; and *Harlock* v. *Ashberry*, 1882, 19 Ch. D. 539), deciding that it must be written with the intention of making or showing the writer liable to the demand, and, as said in *Harlock* v. *Ashberry* (*ubi supra*), must amount to an acknowledgment of a right; and see also *Blair* v. *Nugent* (1846, 3 Jo. & Lat. 658, 677).

It should be noticed that as sec. 34 of 3 & 4 Will. IV. c. 27 only applies to the right or title to "land, rent, or advowson," it is possible that an acknowledgment under sec. 8 of 37 & 38 Vict. c. 37, or under sec. 42 of 3 & 4 Will. IV. c. 27, may be effectual although given after the statutory period has expired (but see *Sutton* v. *S.*, 1882, 22 Ch. D. 511, and *Fearnside* v. *Flint*, 1882, 22 Ch. D. 579; and see also *Gregson* v. *Hindley*, 1846, 10 Jur. 383). In *Kibble* v. *Fairthorne* ([1895] 1 Ch. 224), Romer, J., said: "Take the Act 3 & 4 Will. IV. c. 27, and it will be found that there are two sets of enactments, one dealing with rights against the land, and the other with personal remedies. These two sets of enactments stand on an entirely different footing. As to the land, it is provided that when the statutory limitation operates, not only is the remedy against the land barred, but the mortgagee's interest in it is extinguished. In the second set of provisions, those relating to personal remedies, the statutory limitation has a different effect. There, only the remedy is barred, the debt itself not being extinguished."

Effect of Bar under 3 & 4 Will. IV. c. 27.—Where a right to recover land, rent, or an advowson is barred by the Statute 3 & 4 Will. IV. c. 27, the right or estate barred is by sec. 34 absolutely extinguished, so that it cannot be set up by any subsequent acknowledgment. "The statute of James merely destroys the remedy, the statute of Will. IV. destroys the title, and therefore it is impossible for trustees of real estate to set up an old title which is

non-existent" (*In re Alison*, 1879, 11 Ch. D. 284, see p. 296, per Jessel, M. R.). See also *Sanders* v. *S.*, 1881, 19 Ch. D. 379; *Brassington* v. *Llewellyn*, 1858, 27 L. J. Ex. 297 (not following *Stansfield* v. *Hobson*, 1853, 3 De G., M. & G. 620); and see *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219, and *Markwick* v. *Hardingham*, 1888, 15 Ch. D. 339, 396. See the effect of what is called the parliamentary conveyance by the Act, discussed in the note to *Taylor* v. *Horde*, 1837, 2 Smith's *L. C.*, 10th ed., pp. 701, 702. One important effect, so far as mortgages are concerned, of the right being extinguished, is that decided in *Sands* v. *Thompson* (1883, 22 Ch. D. 614) and *Kibble* v. *Fairthorne* ([1895] 1 Ch. 219), where a mortgagor pays off the money owing under the mortgage he becomes, at law, a tenant-at-will to the mortgagee, the proviso in sec. 7 of 3 & 4 Will. IV. c. 27 not being applicable, and accordingly under that section after the expiration of thirteen years from the date of payment off, the legal estate is revested in the mortgagor. It must be observed, however, that so long as the relation of mortgagor and mortgagee subsists, the possession of the mortgagor is that of tenant-at-will; the proviso in sec. 7 of 3 & 4 Will. IV. c. 27 will be applicable; and accordingly it seems that, although the mortgagee's claim to any mortgage money will; be barred by the mortgagor remaining in possession for twelve years without payment of interest or acknowledgment, nevertheless such possession will not be sufficient to revest the mortgagor with the legal estate.

An important effect of the fact that in the case of the personal remedy for the debt the remedy only is barred and the right not extinguished is, that though sec. 42 of 3 & 4 Will. IV. c. 27 prevents the mortgagee as plaintiff claiming more than six years' arrears of interest, nevertheless if he is defendant in a redemption action he gets all arrears that may be owing (*Edmunds* v. *Waugh*, 1866, 1 Eq. 418, 421; *Marshfield* v. *Hutchings*, 1887, 34 Ch. D. 721; but see *Mason* v. *Broadbent*, 1863, 33 Beav. 296).

Payment of Interest.—The Act 7 Will. IV. and 1 Vict. c. 28 enacts that it shall be lawful for the mortgagee "to make an entry or bring an action at law or suit in equity" to recover the land at any time within twenty years "after the last payment of any part of principal or interest secured by such mortgage." In like manner sec. 40 of 3 & 4 Will. IV. c. 27 (now replaced by sec. 8 of 37 & 38 Vict. c. 57), which limits the time within which money charged on land or legacies can be recovered, provides in effect that an acknowledgment, whether in writing (as to which see above) or by part payment or payment of interest, shall keep alive the right of action.

The other Statute of Limitations, passed under Will. IV. (namely, 3 & 4 Will. IV. c. 42), which requires actions on bonds and other specialties to be brought within twenty years, contains a proviso (s. 5) "that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or part payment or part satisfaction on account of any principal or interest being then due thereon," then the party entitled shall have a further period of twenty years from the date of payment or acknowledgment. None of these provisions require in express terms that the payment to prevent the statute from operating should be by the party liable or his agent, but it has been decided that a payment by a stranger would be insufficient (Hewitt on *Limitations*, p. 118). In *Harlock* v. *Ashberry* (1882, 19 Ch. D. 544), an action for foreclosure, and therefore not within sec. 40 of 3 & 4 Will. IV. c. 27, but within secs. 2 and 24 of that Act and the Act of 7 Will. IV. and 1 Vict. c. 28, it was held that a payment by a tenant of the mortgaged property was not sufficient. Jessel, M. R. (p. 545),

says: "The underlying principle of all the Statutes of Limitation is that a payment to take a case out of the statute must be a payment by a person liable as an acknowledgment of right." Brett, L.J. (p. 548), gives a judgment to the same effect, and both treat this as settled by the judgments in *Chinnery* v. *Evans* (1864, 11 H. L. 115), where the same principle was in effect enunciated, both as to a payment under 7 Will. IV. and 1 Vict. c. 28, and under sec. 40 of 3 & 4 Will. IV. c. 27 (see per Lord Westbury, p. 131; and see *Lewin* v. *Wilson* (1886, 11 App. Cas. 644, 645). In *In re Frisby, Allison* v. *Frisby* (1889, 43 Ch. D. 117), payment of interest by the mortgagor was held to prevent the bar of sec. 40 (if it applied), being a defence in an action against a surety on his separate covenant. See per Fry, L.J. (p. 117): "In my opinion a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it." In that case, Bowen, L.J., expressed an opinion that sec. 40 did not apply to personal actions on the covenant in a mortgage deed brought against persons other than the mortgagor or his representatives, but held that if it did apply, the payment by the mortgagor was sufficient to keep alive the debt against the surety.

So far it is clear that payment by a stranger will not do. But a difficulty arises on the cases, to say whose payment will be sufficient. A danger to mortgagees arises in case of an assignment by the mortgagor of the equity of redemption, if a proposition is to be taken as established on which North, J., and the three judges of the Court of Appeal (but not the House of Lords) partly based their judgments in *Newbould* v. *Smith* (1885, 29 Ch. D. 882; 33 Ch. D. 127; 14 App. Cas. 423), where the mortgagor had assigned the equity of redemption after the mortgage: North, J., and the Court of Appeal held that a payment of interest by the mortgagor after the assignment would not be sufficient to prevent the statute running in favour of the assigns of the equity of redemption. The cases of *Chinnery* v. *Evans*, *Doe d. Palmer* v. *Eyre*, and *Ford* v. *Ager* (*infra*), were not cited. The House of Lords affirmed the decision on another ground, but expressly declined to express an opinion on the point.

On the other hand, in *Doe d. Palmer* v. *Eyre* (1851, 17 Q. B. 366) and *Ford* v. *Ager* (1863, 32 L. J. Ex. 269), it was held that where, after the mortgage persons had acquired a title by possession against the *mortgagor* to part of the mortgaged property, payment of interest by the mortgagor kept alive the rights of the *mortgagee* to recover the whole, though the mortgagor could not have done so. And see *Doe d. Baddeley* v. *Massey* (1851, 17 Q. B. 373; 20 L. J. Q. B. 434), where a title by possession had been acquired by a tenant against the mortgagor to part of the mortgaged property, and it was held that he could not set up the bar against an assign who had purchased and taken a conveyance from the mortgagee as well as the mortgagor, and that such assign was a person claiming under the mortgage within 7 Will. IV. and 1 Vict. c. 28. And in *Chinnery* v. *Evans* (1864, 11 H. L. 129), more than twenty years before action for foreclosure by the mortgagee, the mortgagor of three properties mortgaged had sold two to purchasers without notice of the mortgage, the mortgagee had obtained the appointment of a receiver of the third, and the receiver had out of the rents paid the whole interest, and was held in law the agent of the mortgagor. It was held that this kept alive the right of the mortgagee to recover all three properties (see the judgment of Lord Westbury (p. 135), which seems inconsistent with the judgment of the Court of Appeal in *New-*

bould v. *Smith* (*supra*)). Lord Westbury says: "It is contended on the one side that very great inconvenience indeed would arise if the mortgagee, the existence of whose incumbrance might actually be unknown, should be at liberty after sixty or seventy years to make a demand upon a proprietor of the estate originally comprised in the mortgage, but which has been aliened and sold by the mortgagor perhaps fifty or sixty years before. On the other hand, it is said with great force that the inconvenience and injustice to the mortgagee would be great indeed if, while continuing to receive from the person liable to pay the interest due on his mortgage, he was to be deprived, by the act of the parties entitled to the equity of redemption only, of the estate comprised in his mortgage. And I think it plain that considerations of justice and general convenience and expediency prevail in favour of the latter view." But see these decisions criticised in the recent case of *Thornton* v. *France*, [1897] 2 Q. B. 143.

Payment of interest by a tenant for life of the mortgaged estate is sufficient to keep alive the debt as a charge on the fee. For a recent statement of the law, see per Kay, L.J., *Barclay* v. *Owen*, 1889, 60 L. T. 220; and see *Burrell* v. *Earl of Egremont*, 1843, 7 B. 205; *Hollingshead* v. *Webster*, 1888, 37 Ch. D. 651; *Pears* v. *Laing*, 1871, 12 Eq. Rep. 55, 56, and see *Rafferty* v. *King*, 1836, 1 Keen, 601; *Topham* v. *Booth*, 1887, 35 Ch. D. 607, and distinguish *In re England*, [1895] 2 Ch. 100, 820. There is more difficulty where a claim is made to have the mortgage debt paid out of the assets of a deceased mortgagor not comprised in the mortgage. The payment of interest by a tenant for life, under a settlement made by the owner of the equity of redemption, who has entered into a covenant to pay the mortgage debt, was held by Chitty, J., referring to *Roddam* v. *Morley* and *Forsyth* v. *Bristowe* (*infra*), sufficient to keep alive the right to sue the trustee and executor of the covenantor to have the assets applied in payment (*Dibb* v. *Walker*, [1893] 2 Ch. 429). In *Roddam* v. *Morley* (1856, 1 De G. & J. 1), payment by a devisee for life of real estate of the testator of interest on a debt by bond, in which the heirs were bound, was held to be an acknowledgment by the party liable within sec. 5 of 3 & 4 Will. IV. c. 42, and sufficient to keep the right alive against the parties interested in remainder in the real estate, though it was held that the money due on the bond was not a sum payable out of land within sec. 40 of 3 & 4 Will. IV. c. 27. In *Forsyth* v. *Bristowe* (1853, 8 Ex. 716), payment of interest by the assignee of the equity of redemption was held to keep alive the right to sue the mortgagor on the covenant.

In *In re Tucker* ([1894] 1 Ch. 724, on appeal, [1894] 3 Ch. 429), a partnership case, W. T. retired while a debt was due from the partnership. His share was assigned, the creditors not joining; so that there was no novation. Interest was paid by the continuing partners. Held, that this was sufficient to keep the debt alive as against W. T., even in a case within 21 Jac. I. c. 16, and that the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 14; see *infra*) did not protect him. In *Pears* v. *Laing* (1871, 12 Eq. Rep. 55, 56), a mortgagor had devised the equity of redemption to trustees on trust for D. and E. for life in equal shares as tenants in common. D. also took a derivative interest in a share of the reversion. D. received the rents of one moiety, and paid the interest on the mortgage. Bacon, V.-C., expressed an opinion that this was sufficient to prevent the bar, under 3 & 4 Will. IV. c. 27, or 3 & 4 Will. IV. c. 42, against the remainderman and against persons interested in the other moiety and in the rest of the property of A., the judgment approving of *Roddam* v. *Morley* (1856, 1 De G. & J. 1). In *Ames* v.

Mannering (1859, 26 B. 583), a mortgagor, who had created an equitable mortgage of gavelkind land, died, leaving a widow and three sons. The widow, who was entitled to dower, was allowed to enter and hold the whole property for life. It was held that payment of interest by her kept the mortgage alive against the sons.

In *Hollingshead* v. *Webster* (1888, 37 Ch. D. 651), the devisee for life of the real estate of a testator (and being also his residuary legatee and executrix) paid interest on a simple contract debt due on a promissory note of the testator, and this was held to keep the debt alive against all persons interested in remainder in the testator's estate.

Where the hand to pay and the hand to receive is the same, as a rule, time will not run; *e.g.* where the tenant for life of the property subject to the charge is also the owner of, or entitled to the income of, the money charged thereon (see *Burrell* v. *Earl of Egremont*, 1843, 7 Beav. 205, 237); and see *Topham* v. *Booth* (1887, 35 Ch. D. p. 607; see p. 612), where Lord Langdale says: "He, the tenant for life, receives the income and is entitled to the interest payable thereout, and when he has received the income he is deemed to have paid or kept down the interest, not because of any duty he owes to himself, but because he has a duty to another, *i.e.* to the remainderman, to prevent the accumulation of interest against him." On the other hand, where the person entitled to the fee-simple of the property is also entitled as tenant for life to the money charged thereon, it has been held that (there being no duty on the part of a fee-simple owner to keep down the interest to which he was himself entitled) he could not be presumed to have done so, so as to keep the debt alive against other assets of the testator (see *In re England*, [1895] 2 Ch. 100, on appeal, *ibid.* 820). In this case a father, on the marriage of a son, covenanted to pay £4000 to the trustees of the son's marriage settlement, and died, having devised the estate to the son subject to the charge. The son was under the settlement tenant for life of the income of the charge. He held the estate for more than twelve years without any payment, and the trustees then claimed against the personal estate of the father, the original settlor. It was held that, although the son could not set up the statute to a claim against the land charged (see [1895] 2 Ch. pp. 106, 826), all claim against the settlor's personal estate was barred. In the converse case, where interest was paid upon a specialty debt by the personal representatives of the covenantor, who were also devisees in trust of his real estate, it was held by Lord Chelmsford (*Coope* v. *Cresswell*, 1866, 2 Ch. 112), reversing the decision of Kindersley, V.-C. (1866, 2 Eq. Rep. 106), that this did not keep the debt alive as against the beneficial devisees of the real estate. There was in this case no express charge on the land. See the case of an assignment of the equity of redemption: *Forsyth* v. *Bristowe* (1853, 8 Ex. Rep. 716). In *Dickenson* v. *Teasdale* (1862, 1 De G., J. & S. 52), it was held that payment of interest by one devisee under the will would not keep a debt alive against a devisee of a different property. Here the testator charged all his real estate with payment of debts, and it was also held that this did not create an express trust within sec. 25 of 2 & 3 Will. IV. c. 27.

It must be borne in mind that by sec. 14 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), it is enacted "In reference to the provisions of the Acts of 21 Jac. I. c. 16, s. 3; 3 & 4 Will. IV. c. 42, s. 3; and 16 & 17 Vict. c. 113, s. 20 (Ireland), where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator

shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors, or administrators." It will be observed that this enactment does not in terms apply to cases within 3 & 4 Will. IV. c. 27, and this may sometimes be material (see *In re Frisby*, 1889, 43 Ch. D. 106, 116).

As to the equitable right to recover against the assets of the testator which have been distributed among beneficiaries, see *ante*, p. 511, where the effect of express trusts is discussed, and the cases of *Ridgway* v. *Newstead* (1861, 3 De G., F. & J. 474) and *In re Gale, Blake* v. *Gale* (1885, 31 Ch. D. 196; 32 Ch. D. 371), and also the cases applying where the assets had been *bonâ fide* alienated for value.

It has been held that a mortgage upon a share to which the mortgagor is entitled in money to arise from the sale of land is within 3 & 4 Will. IV. c. 27, and that accordingly under such a mortgage only six years' interest is recoverable (*Bowyer* v. *Woodman*, 1867, 3 Eq. Rep. 313).

As to a charge of debts by a will on real estate giving a simple contract creditor as against the land (but not against the personal estate) twelve years instead of six for the recovery of his debt, see *In re Stephens, Warburton* v. *Stephens*, 1889, 43 Ch. D. 39.

It may be observed that sec. 13 of 23 & 24 Vict. c. 38 in effect extends the operation of sec. 40 of 3 & 4 Will. IV. c. 27 to claims to recover the personal estate of an intestate.

"*Actions on the Covenant*" (3 & 4 Will. IV. c. 42).—In the same year that 3 & 4 Will. IV. c. 27 was passed as to actions or suits for recovery of land and money charged on land, another statute, 3 & 4 Will. IV. c. 42, dealing only with the personal remedy in actions on covenant or other specialty was passed. See this discussed by Mr. Hewitt (p. 127). The writer has not found any case, before the Act of 1874 came in force, dealing with the question whether the action on the covenant for principal could be maintained when the right against the land was barred, and as before the passing of the Act of 1874, the periods for proceedings against the land and on the covenant were both twenty years (although the provisions as to disabilities and acknowledgments were not quite the same), the question can rarely have been material. It was, however, important in the case of proceedings to recover arrears of rent, or interest, as 3 & 4 Will. IV. c. 27, s. 42, only allowed six years' arrears to be recovered, whereas 3 & 4 Will. IV. c. 42 allowed twenty years. It was held by Lord Cottenham in *Hunter* v. *Nockolds* (1849, 1 Mac. & G. 640), as to arrears of interest, after commenting on the case of *Du Vigier* v. *Lee* (1843, 2 Ha. 326), that the two statutes must be reconciled by treating 3 & 4 Will. IV. c. 27, s. 42, as applying only to the land, and 3 & 4 Will. IV. c. 42 as applying only to the personal remedy, and that consequently only six years' interest could be recovered against the land; but that a mortgagee might recover twenty years' arrears in an action on the covenant (*Hunter* v. *Nockolds*, 1847, 1 Mac. & G. 640; *Du Vigier* v. *Lee*, 1843, 2 Ha. 326; and see *Sinclair* v. *Jackson*, 1853, 17 B. 405; *Manning* v. *Phelps*, 1854, 10 Ex. Rep. 59; *Strachan* v. *Thomas*, 1840, 12 Ad. & E. 536). As to the principal sum, however, the question became important after the Act of 1874. 37 & 38 Vict. c. 57 came into force in 1879, repealing by sec. 9 sec. 40 of 3 & 4 Will. IV. c. 27, and re-enacting it by sec. 8, with the substitution of twelve years for twenty. In *Sutton* v. *S.* (1882, 22 Ch. D. 511), the effect of the Act of 1874 in this respect came before the Court of Appeal. In this case the mortgagor in 1868 mortgaged by a deed containing a covenant

for payment of principal with interest on demand; the mortgagee died, having devised and bequeathed all real and personal estate to the plaintiff, his executrix; the last payment of interest was made on the 12th November 1869, so that the twelve years' bar applied as against the land in 1881. In 1882 the plaintiff commenced the action against the mortgagor on the covenant. It was held by Chitty, J., that the remedy on the covenant was not barred, but his decision was reversed by the Court of Appeal, which held that as by sec. 8 of 37 & 38 Vict. c. 57, the remedy against the land was barred, the right of action on the covenant was gone also. Cotton, L.J., said (p. 518): "One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds, supra*, decided by Lord Cottenham, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands, only six years' interest could be allowed, yet he based his decision on this ground, that one must take the two Statutes 3 & 4 Will. IV. c. 27 and 3 & 4 Will. IV. c. 42 together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the later one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to lead to the same bar to an action on the covenant as that which is provided by sec. 42 of the earlier Act." As to this reasoning it may be observed that the Act of 1874 enacts in sec. 9 that the 3 & 4 Will. IV. c. 27, and 7 Will. IV. and 1 Vict. s. 28, as altered, are to be construed with it. In *Fearnside* v. *Flint* (1882, 22 Ch. D. 579), the doctrine of *Sutton* v. *S.* was extended, and the twelve years' limit was held to apply to an action on a collateral bond given by the mortgagor; but in *In re Powers* (1885, 30 Ch. D. 291), it was held not to apply to an action on a bond given by a surety for the mortgagor. In *In re Frisby* (1889, 43 Ch. D. 106), payment of interest by the mortgagor was held to keep alive the right to sue the surety on a joint and several covenant by him and the mortgagor in the mortgage deed. In this case, Kay, J., in the Court below, and Bowen, L.J., in the Court of Appeal, said that sec. 8 of 37 & 38 Vict. c. 57 would not apply to any personal action except one against the mortgagor or persons claiming through him; Cotton, L.J., expressed the opposite view, that it would apply to an action against the surety. Fry, L.J., declined to express an opinion on this point. The writer has not found any case since the Act of 1874 of a mortgagor suing for interest on the covenant after the six years' limit against the land was barred; but in *Darley* v. *Tennant* (1885, 53 L. T. 257), in an action for royalties on a covenant in a mining lease, it was held by North, J., following the decision in *Hunter* v. *Nockolds*, as reconciling 3 & 4 Will. IV. c. 27, s. 42, and 3 & 4 Will. IV. c. 42, s. 3, that the time for an action in specialty in 3 & 4 Will. IV. c. 42 was to be allowed, and twenty years' arrears were recoverable. It would seem that according to this decision, if an action were brought on the covenant for arrears of interest in a case where the right to the principal has been kept alive, *Sutton* v. *S.*, *supra*, would not apply, but the old case of *Hunter* v. *Nockolds, supra*, and twenty years' arrears of interest would be allowed.

In *Edmunds* v. *Waugh* (1866, 1 Eq. Rep. 418), the proceeds of land sold under a mortgagee's power of sale by trustees of his will were paid into Court in a suit to administer the mortgagee's estate, and the trustees of the mortgagee petitioned for payment out. Held, that the mortgagee himself would have been entitled to retain twenty years' interest out of the pro-

ceeds of sale; and the position was the same, the petition not being an action or suit to recover arrears of interest within the meaning of sec. 42 of 3 & 4 Will. IV. c. 27. In *In re Marshfield* (34 Ch. D. 721), it was held by Kay, J., that sec. 42 of 3 & 4 Will. IV. c. 27 did not affect the right of a mortgagee who had sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. The judge approved of *Edmunds* v. *Waugh*, *supra*. But see *In re Stead*, 1876, 2 Ch. D. 713.

In *Smith* v. *Hill* (1878, 9 Ch. D. 143), the mortgage was a reversionary interest in personal estate which happened to be invested in a mortgage of land. Hall, V.-C., held that it must be treated as personal estate, and therefore not a charge on land within sec. 42 of 3 & 4 Will. IV. c. 27, and the whole arrears of interest due for sixteen years might be recovered. The action was brought by the mortgagee for administration of the testatrix's estate, and payment of the money due to him on his security. If it had been an interest in land the judge seems to have thought that only six years' interest would be recoverable.

In *Elvy* v. *Norwood* (1852, 5 De G. & Sm. 240), on a bill by the heir of a mortgagor who had covenanted for payment of interest, it was held the heir could not redeem without paying twenty years' interest. This was put on the right of the mortgagee to tack as against the heir to avoid circuity of action, though he could not have tacked as against the covenantor; and also on the ground that the personal liability on the covenant was open for twenty years. From the ground of the decision it seems to come under the class of cases enabling a mortgagee to tack debts not within his security against the heir or beneficial devisees of the mortgagor to avoid circuity of action (see *Heams* v. *Bance*, 1748, 3 Atk. 630; *Lowthrian* v. *Hasel*, 1790, 3 Bro. C. C. 162; *Rolfe* v. *Chester*, 1855, 20 Beav. 610; *Thomson* v. *T.*, 1856, 22 Beav. 341; *In re William's Estate*, 1872, 15 Eq. Rep. 270, though not against assignor for value; *Talbot* v. *Frere*, 1878, 9 Ch. D. 568. See also *In re Haselfoot's Estate*, 1872, 15 Eq. Rep. 327).

In *Sinclair* v. *Jackson* (1853, 17 Beav. 405), the claim was made to apply the doctrine in *Elvey* v. *Norwood* to a foreclosure action against the co-heiresses of the mortgagor and other persons. The claim was refused on the ground that it was not raised by the pleadings; the judge, after referring to the distinction between a redemption action and a foreclosure action, intimated that though it was a foreclosure action, if the claim had been raised by the pleadings, it might have been sustained.

In *Mellersh* v. *Brown* (1890, 45 Ch. D. 225), in an action for foreclosure of a mortgage of a reversionary interest in personal estate, the full arrears then due for fourteen years were allowed on the ground that there was no Statute of Limitations applicable. Mr. Hewitt points out that when the mortgaged property is reversionary, or a tenancy is subsisting between mortgagor and mortgagee, the mortgagee's right to the land might continue after sec. 8 of 37 & 38 Vict. c. 57 had barred the right to recover the money, and he suggests that as *Sutton* v. *S.* proceeded on the ground that the right against the land was gone it would not in such case prevent an action on the covenant being brought within the twenty years allowed by sec. 3 of 3 & 4 Will. IV. c. 42 (Hewitt, pp. 130, 115, 116).

Disabilities.—Under sec. 7 of 37 & 38 Vict. c. 57, re-enacting, with the substitution of twelve years for twenty, the 28th sec. of 3 & 4 Will. IV. c. 27, it has been held that sec. 3 (which contains the saving for disabilities) does not apply, and the twelve years' bar to a redemption suit from the time when the mortgagee entered into possession is absolute, and is not to be

extended by any disability of the mortgagor (*Forster* v. *Patterson*, 1881, 17 Ch. D. 132); and see *Kinsman* v. *Rouse* (1881, 17 Ch. D. 104), which was decided under sec. 28 of 3 & 4 Will. IV. c. 27. Mr. Hewitt (p. 149) observes that from the wording of sec. 8 of 37 & 38 Vict. c. 57, re-enacting sec. 40 of 3 & 4 Will. IV. c. 27, it follows that if a person entitled to money secured upon land is an infant or of unsound mind at the time when the right to receive the same accrues, time will not run whilst the disability continues; but that according to the principle affirmed in the case of *Hornsey Local Board* v. *Monarch Investment Society* (1889, 24 Q. B. D. 1, C. A.), it would seem to follow that a mortgagee must in all cases be treated as having "a present right to receive" within the statute as soon as the mortgage is executed; and if this is so no subsequent disability would prevent time continuing to run. As regards the bar to proceedings to recover arrears of rent "or interest in respect of any sum of money charged upon or payable out of any land or rent," sec. 42 of 3 & 4 Will. IV. does not expressly or by implication contain any reservation in case of disability. It may be contended, however, that though the right as against the land under sec. 42 might be barred, the personal remedy might subsist by reason of a disability under 21 Jac. I. c. 16, or 3 & 4 Will. IV. c. 42. See this discussed by Mr. Hewitt (pp. 150, 151). The principle of the decision in *In re Sutton*, *supra*, was that when the right was barred as against the land, the personal remedy fell with it; but the case of *Darley* v. *Tennant* (1885, 53 L. T. 257) decided that *Sutton* v. *S.* did not apply to proceedings to recover arrears of rent; and it would therefore seem, according to the decision in *Darley* v. *Tennant*, that the right to enforce personal payment might subsist in case of a person entitled being under disability.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), in ejectment by the mortgagee upon the mortgagor's paying principal, interest, and costs, it shall be deemed a full satisfaction on his part; and the Court may compel the mortgagee to reconvey (s. 219). But the Act is not to extend to cases where the right to redemption is controverted, or the money due not adjusted (s. 220), or to prejudice any subsequent mortgagee (*ibid.*).

Time will cease to run against the mortgagee on his obtaining an order of foreclosure absolute, as the effect of such order is to vest the ownership and beneficial title to the mortgaged land for the first time in the mortgagee. Hence in *Heath* v. *Pugh* (1881, 6 Q. B. D. 345), an action brought within twenty years next after the order of foreclosure by the mortgagee to recover possession of such land, was held since the Judicature Acts not to be barred by the Statute of Limitations (3 & 4 Will. IV. c. 27, and 1 Vict. c. 28); although more than twenty years had elapsed since the date of the mortgage, and since the last payment of principal or interest thereby secured. On appeal to the House of Lords this case was affirmed, *nom. Pugh* v. *Heath* (1882, 7 App. Cas. 235; see also *Wrixon* v. *Vize*, 1842, 3 D. & W. 117, 119, 123; and *Harlock* v. *Ashberry*, 1882, 19 Ch. D. 539, reversing Fry, J., 1881, 18 Ch. D. 229).

[*Authorities.*—In 1897, the year before this article was written, three important works were published—

(1) A new edition of Fisher's standard work on *Mortgages*, by Mr. Arthur Underhill, 995 royal 8vo pages without the index.

(2) A complete work by Mr. L. G. G. Robbins, assisted by Mr. F. T. Maw, in two royal 8vo vols., containing together 1758 pages, which is founded upon and embodies the principal parts of Coote on *Mortgages*.

(3) An original and valuable work of Mr. W. Ashburner, in one royal 8vo vol., containing 624 pages.

There was also published in 1897 a new edition of White and Tudor's *Equity Cases*, and the notes in it to the cases of *Thornborough* v. *Baker*, *Howard* v. *Harris*, *Russell* v. *R.*, and *Marsh* v. *Lee*, which were compiled by the present writer, cover a considerable part of the law with respect to mortgages.]

As to *Hypothecation*, see BILLS OF LADING; CARGO; EQUITABLE ASSIGNMENT, vol. v. p. 35; and *sup.* at pp. 496 *et seq.*; SHIP.

Supplemental Notes.